85-197

Supreme Court, U.S.
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No. .....

In the Supreme Court of the United States

October Term 1985

ROYSTON E. POTTER,

Petitioner,

vs.

MURRAY CITY, a municipal corporation, CALVIN G. GILLEN, individually and in his capacity as Chief of Police of Murray City, MURRAY CITY CIVIL SERVICE COMMISSION, THE HONORABLE SCOTT M. MATHESON, as Governor of the State of Utah, THE HONORABLE DAVID L. WILKINSON, as Attorney General of the State of Utah, STATE OF UTAH and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 26, 1985

QUESTIONS PRESENTED

1. Did the lower courts err in granting and affirming respondents' motions for summary judgment and in denying petitioner's motion for summary judgment?

2. Is petitioner's religious belief in, and practice of, plural marriage constitutionally protected under the First and Fourteenth Amendments to the United States Constitution?

3. Have the respondents established a compelling interest in prohibiting plural marriage?

4. Has the practice of plural marriage been demonstrated to be harmful to the public peace, safety or order?

5. Are there less restrictive alternatives than absolute prohibition of the practice of plural marriage?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Royston E. Potter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 28, 1985.

OPINION BELOW

The opinion of the Court of Appeals, is reported at 706 F.2d 1065 (10th Cir. 1985) and appears in Appendix A hereto. The opinion rendered by the District Court for the District of Utah, Central Division, appears in Appendix B hereto and is reported at 585 F.Supp. 1126 (D. Utah 1984).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 28, 1985 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. *United States Code*, Title 42 Section 1983:

   Civil Action for deprivation of rights. Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. United States Constitution, First Amendment:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Utah State Constitution, Article III, Section 1:

> First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

5. Utah Code Ann. §76-7-101(1) and (2):

> Bigamy—Defense—Testimony.—(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, he purports to marry another person or cohabits with another person.
>
> (2) Bigamy is felony of the third degree.

STATEMENT OF THE CASE

Petitioner brought an action in the District Court for the State of Utah for a declaratory judgment that Utah's anti-plural marriage laws violate petitioner's First Amendment rights to freely practice his religion and for damages for violation of his civil rights as a result of his termination from the Murray City Police Department. The parties filed cross motions for summary judgment in which the following material facts were not in dispute:

1. The petitioner, Royston E. Potter, is 31 years of age and resides in Salt Lake County, Utah. On February 5, 1972, in a civil and religious ceremony, he married Denise Hoagland in the LDS ("Mormon") Temple at Idaho Falls, Idaho. Tenth Circuit Record on Appeal (hereinafter "ROA"), Vol. VII, pp. 4, 16 and 17.

2. Mr. Potter is a deeply religious man and holds a genuine religious belief, faith and conviction in the principle and practice of plural marriage which is, in Mr. Potter's belief, a doctrinal and biblical ordinance necessary to his exaltation. ROA, Vol. VII, pp. 29-57; ROA, Vol. VII, p. 575.

3. On April 26, 1980, Mr. Potter, in a religious ceremony, married his second wife, Vera. ROA. Vol. VII, pp. 56-57.

4. Mr. Potter's wives, Denise and Vera, consented to a plural marriage relationship. As of December 1, 1982, Mr. Potter had five children born of these relationships. Petitioner's wives and children receive adequate care, love and attention and want for no necessity of life. ROA, Vol. VII, p. 70; ROA, Vol. III, p. 575.

5. Petitioner was hired by the Murray City Police Department in September of 1980 as a police officer. His work record, according to Police Chief Calvin L. Gillen, is exemplary. Following his termination on December 1, 1982, an administrative hearing was conducted by the Murray City Civil Service Commission to review the decision of Chief Gillen. The decision of the Civil Service Commission appears in Appendix C. There was no evidence before the Civil Service Commission, nor is there evidence in the record, that Petitioner's practice of

plural marriage had an impact upon his job performance. ROA, Vol. III, p. 576.

6. Article III, Section 1, and Article XXIV, Section 2, of the Constitution of the State of Utah prohibit the practice of plural marriage. *Utah Code Ann.*, §76-7-101 (1953), prohibits and makes criminal the practices of bigamy and unlawful cohabitation.

7. The State of Utah has admitted that there is "no indication whatsoever that the Utah Legislature has ever, since statehood was achieved in 1896, attempted to make the fundamentally sociological judgment of whether or not monogamous marriage is empirically superior to polygamy." ROA, Vol. II, p. 361. The State of Utah, further admits that it "has never considered on a policy basis whether these particular laws are wise or not. Utah has not had occasion, because of the federal mandate reflected in the [Utah] Constitution, to give public policy consideration to these particular issues." ROA, Vol. VI, p. 6.

8. Petitioner was terminated by Murray City on December 1, 1982, (1) for failure to uphold his oath of office; (2) for failure to comply with Article III, Section 1, of the Utah Constitution; and (3) for failure to comply with §76-6-101(1), Utah Code Ann. (1953, as amended). ROA, Vol. III, p. 576.

9. The Murray City Civil Service Commission ordered that Mr. Potter be reinstated if he forthwith abandoned the practice of plural marriage. Upon failure to do so within five days, then the decision to terminate Mr. Potter would be affirmed. ROA, Vol. III, p. 577.

10. As a result of petitioner's termination, he filed an application for unemployment benefits. Murray City contested payment of benefits by the Industrial Commission of Utah, Department of Employment Security. The Industrial Commission's decision, which appears in Appendix D, finds that Mr. Potter's conduct did not render him unsuitable to perform the tasks of a police officer, that the Salt Lake County Attorney had refused to prosecute Mr. Potter, and that there has been general public acceptance that similar cases have not been pursued by law enforcement bodies. This decision also finds that Mr. Potter has not lost his usefulness, effectiveness or credibility in the community, with Murray City or with his fellow officers. ROA, Vol. III, p. 578.

11. If Article III, Section 1 and Section 76-6-101, are found to be unconstitutional, in accordance with the prayer of petitioner's Amended Complaint, then Chief Gillen would reinstate Mr. Potter to his position as a Murray City police officer. ROA, Vol. III, p. 576.

12. There were no affidavits, evidence or empirical data before the trial court to show that the practice of plural marriage is harmful to the public peace, safety or order. ROA, Vol. III, p. 578.

13. The State rspondents conceded in oral argument that the government of the State of Utah has "never asserted that polygamy is inherently or demonstrably a moral evil with direct consequences of a negative nature to its participants or to its neighbors." ROA, Vol. IX, p. 63.

14. There are between 5,000 and 10,000 individual

family members of polygamist families currently residing in Utah. ROA, Vol. IV, p. 619.

15. The State has acquiesced in being a party to this suit. ROA, Vol. VI, p. 11.

The District Court denied petitioner's motion for summary judgment and granted the respondent's motions for summary judgment. On appeal, the decision was modified by the Tenth Circuit in that it was held there was no jurisdictional basis to make the United States a party to the suit. The decision was otherwise affirmed.

REASONS FOR GRANTING THE WRIT

1. THIS CASE RAISES SIGNIFICANT AND RECURRING QUESTIONS RELATING TO THE BALANCING OF GOVERNMENT INTERESTS AGAINST CONFLICTING RELIGIOUS PRACTICES.

In *Reynolds v. United States,* 98 U.S. (8 Otto) 145 (1878), the United States Supreme Court upheld a conviction for the practice of bigamy (polygamy) against a challenge that the congressional antibigamy statute violated the defendant's right to the free exercise of his religion. The Court directed its inquiry to the "guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong." *Id.* at 162. The Court distinguished between religious beliefs and actions based on religious beliefs, holding that only religious belief and opinion, not practice, are protected by the First Amendment. *Id.* at 166.

This belief/actions distinction was rejected by the

Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where the Court reversed the convictions of some Jehovah's Witnesses for violating a state statute requiring a person to obtain a certificate prior to soliciting for any alleged religious cause from anyone other than a member of the organization. The Court recognized that religious conduct is not without First Amendment protection and found the convictions to be improper "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state. . ." *Id.* at 311.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court firmly established the modern test for determining the constitionality of governmental regulation that infringes on the constitutional right of free exercise of religion. The Court held that an otherwise neutral statute that burdens an individual's free exercise of religion may be justified only by a compelling interest, but it is also "incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407 (footnote omitted). The *Sherbert* Court then held that the denial of unemployment compensation to a member of the Seventh-Day Adventist Church, who was discharged by her state employer because she would not work on Saturday, the Sabbath day of her faith, was unconstitutional. *Id.* at 399.

The modern test in the area of free exercise of religion was further enunciated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, the Amish belief that salvation requires life in a church community apart from the

secular world and its influence, conflicted with a state statute requiring compulsory school attendance by children until the age of sixteen. This belief was not merely a matter of personal preference but one of deep religious conviction and intimately related to daily living. The Court employed a strict scrutiny test in examinging the statute, stating that "it must appear either that the state does not deny the free exercise of religious belief by its requirement or that there is a state interest claiming protection under the Free Exercise Clause." A state interest in requiring compulsory education was recognized but the Court stated that interest was not totally free from a balancing process. *Id.* at 214.

The Court found that an exemption from the law for the Amish would not overly burden the state in achieving its legitimate end but the Amish would be unjustifiably burdened in their free exercise of religion if not exempted from the requirements of the law. The Court concluded "only those interests of the highest order can over balance legitimate claims to the free exercise of religion." *Id.* at 215. Thus, not only must a compelling or overriding state interest be demonstrated but also the Court must balance the burden on the exercise of the right as compared to the burden on the state in allowing an exemption. Additionally, the Court must determine whether there exists a less restrictive method of regulating the religious practice.

The *Reynolds,* decision, despite the subsequent implicit rejection of its holding, is still cited as viable precedent in the area of free exercise. That decision, however, must be viewed in light of the circumstances of the

time. Even though the First Amendment was intended to protect the numerous and divergent religious sects of America from governmental interference and societal persecution, the Mormon Church met with very violent social and governmental hostility. See Morill Act of 1862, Ch. 126, 12 Stat. 501 (1862); Edmunds Act of 1882, Ch. 47, 22 Stat. 30 (1882) and Edmunds-Tucker Act, 24 Stat. 635 (1888). Nineteenth Century America was thoroughly immersed in the morality and values of the Victorian Era and polygamy was viewed as unchristian, a moral opprobrium. The rhetoric of the Court in *Reynolds,* however, was not supported by evidence in the record but reflected instead the supposed social mores of the time. Accordingly, the rationale of *Reynolds,* deeming polygamy odious and comparing the practice to human sacrifice, simply cannot be disregarded as the District Court below suggests. ROA Vol. V, p. 793 (Appendix B, p. 34). Since *Reynolds,* culture and society in America have changed dramatically along with the analysis by the Court in free exercise cases.

Thus, although a balancing test has been firmly established in constitutional law, the decisions are unclear as to how governmental needs actually are to be balanced against individual religious practices. The decisions of the Supreme Court itself offer little guidance. *See e.g. Thomas v. Review Board,* 450 U.S. 707 (1981) (no compelling interest existed to deny Jehovah's Witness unemployment compensation where he terminated his employment because he was transferred from roll foundry to a department that produced turrets for military tanks); *United States v. Lee,* 455 U.S. 252, 258-60 (1982) (fed-

eral government can require Amish to pay social security taxes contrary to their religious beliefs because vitality of social security system requires mandatory participation by all).

Lower courts similarly conflict in their application of the balancing test. *See e.g. Palmer v. Board of Education,* 603 F.2d 1271 (7th Cir. 1979) (probationary teacher does not have protected interest to disregard prescribed curriculum which conflicted with religious belief); *McGinnis v. U.S. Postal Service,* 512 F.Supp. 517 (N.D. Cal. 1980) (postal clerk refusing to distribute draft registration materials as violative of her religious beliefs entitled to injunctive relief against imminent dismissal).

Polygamists continue to live and practice in Utah as they have done for over 100 years. During that time it has never been demonstrated that polygamy is harmful to the public safety, peace or order. The test employed in *Reynolds* was belief/actions pursuant to which polygamy was found to be unprotected under the First Amendment. That religious practice should now be re-examined and balanced according to the new constitutional tests which have evolved.

The instant case offers the Supreme Court the opportunity to re-examine the vitality of *Reynolds* and to clarify the scope of the balancing test under the free exercise clause of the U.S. Constitution.

2. THERE HAS BEEN NO SHOWING OF A COMPELLING STATE INTEREST AND THAT THERE ARE NO LESS RESTRIC-

TIVE ALTERNATIVES FOR REGULATING PLURAL MARRIAGE.

Fundamental rights guaranteed under the First and Fourteenth Amendments cannot be restricted unless there has been a showing of a compelling state interest and that no less burdensome alternatives exist. *Yoder, supra; Roe v. Wade,* 410 U.S. 113 (1979). These cases clearly place the burden on the State to come forward with affirmative evidence and to *demonstrate* a compelling interest and that no less restrictive alternatives exist, something the State of Utah and Murray City have been unable to do.

Despite the admissions by the State of Utah that it has not examined polygamy since 1896 the District Court, while recognizing the State's burden, incorrectly took notice that "the prohibition of polygamy as provided by its Constitution and laws, continues to be its settled public policy as does its commitment to monogamy as the cornerstone of its regulation of marriage, about which are clustered enumerable supportive laws passed by its legislature over the succeeding years." Appendix B p. 23-24. The Circuit Court agreed with this analysis concluding "[m]onogamy is inextricably woven into the fabric of our society." Appendix A, p. 10-11. No evidence was presented however, demonstrating that the laws of Utah are based on a commitment to monogamy; no evidence was presented demonstrating a compelling interest.

Even assuming *arguendo* the existence of such a public policy, this argument is, as the District Court pointed out, an "oversimplification or begging of the ques-

tion." Appendix B, p. 25. It used to be the public policy of some states to require separate facilities for blacks, to require poll tests and to require blacks to ride in the back of the bus. To discharge Mr. Potter because his conduct is not in accord with an unconstitutional public policy is itself unconstitutional. See *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983). An unconstitutional law cannot be valid public policy.

The State of Utah has argued that an exemption for religiously based polygamy would create legal chaos, would be administratively unworkable and impossible to implement. This litany of horrors, however, has not occurred since plural marriage arrived in Salt Lake City on July 24, 1847. Utah's laws have accommodated the practice of plural marriage in Utah for over 135 years. Further this sort of speculation is impermissible and cannot resolve the State's burden to present evidence of its interest. *Sherbert v. Verner*, 374 U.S. at 407. Additionally, as the District Court point out, "such cases as *Brown v. Board of Education of Topeka*. 347 U.S. 483 (1954), and *Miranda v. Arizona*, 384 U.S. 435 (1966), teach us that the bother of responding to constitutional mandates does not justify their disregard." Appendix B, p. 25. The State defendants have not presented any evidence to support the claim that laws will become unworkable, nor how, nor why they will become unworkable. Nor have defendants cited any case law to support these claims. Indeed, the fact that at least ten thousand members of polygamist families currently live and operate under the laws of Utah rebuts any assertion that the system is structured only to accommodate monogamy.

Petitioner's conduct here is based on fundamental rights and, although the District Court and the Court of Appeals correctly recognized the State's burden, no such showing of a compelling interest was made by defendants nor found by the Court. In order to prevail and meet the constitutional burden, the defendants *must* demonstrate a compelling interest in the regulation of Mr. Potter's personal life *and* that there is no less restrictive method of achieving governmental ends. The latter constitutional test was ignored by the defendants in their briefing and the lower courts in their analysis. The burden cannot be satisfied through mere speculation; the failure of the courts below to require such a showing was error.

3. THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS AS TO THE EXISTENCE AND EXTENT OF A PRIVACY RIGHT UNDER THE FOURTEENTH AMENDMENT.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the United States Supreme Court held that penumbral emanations from specific guarantees in the Bill of Rights create constitutionally protected zones of privacy which surround the marital relationship and held that Connecticut statutes proscribing the use of contraceptives violated that marital zone of privacy. *Id.* at 484-86, 495-97 (Goldberg J., concurring).

Although a constitutional right of privacy is clearly recognized as a fundamental right, *Roe v. Wade, supra*, lower courts have been unable to agree as to the extent

of that right. Accordingly, the decisions in this area reflect vastly divergent results and analytical approaches. The Tenth Circuit here declined to extend the right of privacy to protect polygamous marriages, stating that no authority existed for so doing. See p. 11 of Appendix A hereto. That holding conflicts with the rationale adopted by several other circuits. See *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983) aff'd, 746 F.2d 1475 (5th Cir. 1984); *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983); *Harwick v. Bowers,* ..... F.2d, ..., (11th Cir. 1985), 53 U.S.L.W. 2591 (June 4, 1985). These courts have recognized the existence of a fundamental right of sexual privacy. The basis for these decisions is focused not on the specific conduct involved by the right asserted; it is not bigamy nor cohabitation, but the right to privacy.

In *Briggs v. North Muskegon Police Dept., supra,* the Court awarded damages under Section 1983 to a police officer who had been dismissed for cohabiting with a woman not his wife. The District Court concluded that "better logic" supported the constitutional right of sexual privacy and held that "the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of defendants' acts on more than a minimal rationality basis." *Id.* at 590. The Court rejected the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct, and that the purpose of constitutional protection "is to prevent such majoritarian coercion." *Id.*

In *Hardwick, supra,* the Eleventh Circuit was asked

to rule whether a Georgia sodomy statute infringed on a constitutional right of privacy of a homosexual arrested for committing sodomy with a consenting male adult in his own home. The court there held that the statute infringed upon fundamental constitutional rights and stated:

> In sum, the Supreme Court's analysis of the right to privacy in Griswold, Eisenstadt, and Stanley v. Georgia, 394 U.S. 557 (1969), leads to the conclusion that the Georgia statute implicates a fundamental right of the homosexual. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. 53 U.S.L.W. at 2592.

The court then remanded the case for a determination of whether the state had compelling interests and whether there were any less restrictive alternatives. See also *Thorne v. City of El Segundo, supra,* (questioning into and reliance on sexual life of plaintiff in rejecting plaintiff's job application violated plaintiff's constitutionally protected interests when such conduct did not interfere with job performance.)

In *Shawgo v. Spradlin,* 701 F.2d 470 (5th Cir. 1983) *cert. denied, sub nom Whisenhunt v. Spradlin,* ..... U.S. ....., 104 S.Ct. 404, however, a contrary result was achieved. In that case, the Fifth Circuit held that the discipline of two police officers for cohabitation and subsequent dismissal of one did not violate their constitutional rights and held that the right of privacy could not be extended to cover the conduct at issue.

The conflicts in the decisions dealing with sexual privacy demonstrate that guidance from the Supreme Court is needed in this important area of constitutional law and justify a grant of certiorari to review the decision of the court below in this case.

CONCLUSION

This case raises significant and recurring questions with regard to the balancing of government interests against the free exercise of religion. It presents an opportunity to re-examine *Reynolds* in light of the modern tests dealing with free exercise of religion and to clarify the evidentiary showing required of a state in establishing its compelling interest and the lack of less restrictive alternatives. Finally, the decision below presents a the right of privacy. For these reasons, a writ of certiorari should issue to review the decision of the Tenth Circuit.

Respectfully submitted,

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July 26, 1985

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1985, forty copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543 and three copies were mailed, postage prepaid to the following:

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I further certify that all parties required to be served have been served.

/s/
DENNIS V. HASLAM

/s/
NOTARY PUBLIC, Residing in
Salt Lake County, State of Utah

Subscribed and sworn to before me this 26th day of July, 1985.

My Commission Expires: April 12, 1988

Supreme Court, U.S.
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APPENDICES A THROUGH D TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 26, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROYSTON E. POTTER,

Plaintiff-Appellant,

vs.

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Defendants-Appellees.

No. 84-1813

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF UTAH
(D.C. No. C-83-0174-C)

Dennis V. Haslam (Donald J. Winder, and Kathy A. F. Davis of Winder & Haslam, Salt Lake City, Utah, were also on the brief) for Plaintiff-Appellant

Allan L. Larson (Patrice Arent Mulhern of Snow, Christensen & Martineau, Salt Lake City, Utah, and H. Craig Hall, Murray City Attorney, Murray, Utah, were also on the brief) for Murray City, Calvin G. Gillen, and Murray City Civil Service Commission, Defendants-Appellees

Drake Cutini, Attorney, Department of Justice (Richard K. Willard, Acting Assistant Attorney General, Washington, D.C.; Brent D. Ward, United States Attorney; Mark

H. Gallant, Attorney, Department of Justice, Washington, D.C., were also on the brief) for the United States of America, Defendant-Appellee

David L. Wilkinson, Attorney General of The State of Utah, and Paul M. Tinker, Deputy Attorney General, and Nicholas E. Hales, Assistant Attorney General of the State of Utah, were on the brief for the State Appellees.

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and SEAY, District Judge*

HOLLOWAY, Chief Judge

In this suit the plaintiff-appellant Royston E. Potter (plaintiff) challenges Utah's proscription against polygamy or plural marriage.[1] His principal claim is that the termination of his employment as a city police officer for the practice of plural marriage violated his rights to the free exercise of his religion and his right to privacy. On cross-motions for summary judgment, the district court ruled in favor of defendants, explaining its reasoning in a scholarly opinion. *Potter v. Murray City*, 585 F. Supp. 1126 (D. Utah 1984). Plaintiff appeals.

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*The Honorable Frank H. Seay, Chief Judge of the United States District Court for the Eastern District of Oklahoma, sitting by designation.

[1] The Utah Constitution provides in pertinent part:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this State:
> [Religious toleration — Polygamy forbidden]
> FIRST: — Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

Utah Const. art. III; see also Utah Code Ann. § 76-7-101 (1978) (bigamy is a felony of the third degree).

I

Plaintiff is a former police officer of Murray City, Utah. The City terminated plaintiff's employment after it was learned that he practiced plural marriage. The basis for the discharge was that by his plural marriage plaintiff failed to support, obey and defend Article III of the Constitution of the State of Utah.

Plaintiff brought suit under 42 U.S.C. § 1983 and the First and Fourteenth Amendments. Brief of Appellant 1. He sought monetary damages against the City, its Chief of Police, and the Murray City Civil Service Commission. 585 F. Supp. at 1128. He also sought declaratory and injunctive relief against the State of Utah and its Governor and Attorney General to determine that Utah's laws prohibiting plural marriage are invalid and to enjoin their enforcement. *Id.* Because of the claim that Utah's proscription against plural marriages was mandated by Congress in Utah's Enabling Act as a condition for admission into the Union,[2] the trial court on

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[2] The Utah Enabling Act provided in part:

> An Act To enable the people of Utah to form a constitution and state government, and to be admitted into the Union on an equal footing with the original States.
>
> **Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,** That the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided.
>
> . . . .
>
> First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: **Provided,** That polygamous or plural marriages are forever prohibited.

Act of July 16, 1894, ch. 138, 28 Stat. 107, 108 (emphasis in original).

motion of the State of Utah ordered the United States to be joined as a party.

On appeal, plaintiff argues that (1) the portion of Utah's enabling act requiring that Utah forever prohibit polygamy is void by reason of the equal footing doctrine; (2) plaintiff's termination for practicing plural marriage violated his First Amendment right to the free exercise of religion; (3) his termination infringed on his fundamental right of privacy; and (4) his termination violated the constitutional guarantees of due process and equal protection because Utah's laws prohibiting plural marriage have long been in desuetude. Defendants disagree and also assert a number of defenses. We need not reach any of these arguments because we conclude that plaintiff's constitutional claims lack merit.

II

Analysis

A. *The Equal Footing Doctrine*

Plaintiff argues that Utah's Enabling Act providing that polygamy will be forever prohibited violates the equal footing doctrine. Assuming, *arguendo*, that the Enabling Act does violate the doctrine, it would not entitle plaintiff to any relief.

The equal footing doctrine embraces the precept that each state is "equal in power, dignity, and authority," and that a state's sovereign power may not be constitutionally diminished by any conditions in the acts under which the State was admitted to the Union; any conditions imposed by Congress "would not operate to restrict

the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress." *Coyle v. Smith*, 221 U.S. 559, 567, 573, 574 (1911).[3] Assuming, *arguendo*, that the Enabling Act does violate the equal footing doctrine, as the district court recognized, the State of Utah had

> full power since statehood to enact or amend in the manner provided by its own laws, any consti-

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[3] In **Coyle**, a provision in Oklahoma's Enabling Act required the state capital to be originally located in Guthrie, Oklahoma. The second section of the Enabling Act, pertaining to Oklahoma, provided in part that:

> The capital of said State shall be temporarily be at the city of Guthrie, and shall not be changed therefrom previous to Anno Domini Nineteen Hundred and Thirteen, but said capital shall after said year be located by the electors of said State at an election to be provided for by the legislature.

221 U.S. at 564.

On June 11, 1910, the question of location of the state capital was submitted to a popular vote.

> Once it had become clear that a majority of the voters of the state wanted the capital at Oklahoma City, the Governor [Charles N. Haskell], who was at that time in Tulsa, telegraphed his secretary, W. B. Anthony, to pack up the great seal and remove it to Oklahoma City while he himself chartered a special train to take him to that place. In consequence, the people of Oklahoma City found to their considerable surprise that they were suddenly in possession of the state government.

E. Dale & M. Wardell, **History of Oklahoma** 324 (1948); **see also** I. Hurst, **The 46th Star: A History of Oklahoma's Constitutional Convention and Early Statehood** 129-34 (1957).

After the capital was moved to Oklahoma City, property owners in Guthrie brought suit. **Coyle** 221 U.S. at 563. The Supreme Court held that the Enabling Act could not prevent the State from moving its capital, stating:

> Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

221 U.S. at 579.

> tutional or statutory provisions dealing with the subject of marriage consistently with the Constitution of the United States as the supreme law of the land. The prohibition of polygamy as provided by its Constitution and laws, continues to be its settled public policy as does its commitment to monogamy as the cornerstone of its regulation of marriage.

585 F. Supp. at 1137.

We agree with the reasoning of the district court. If the original ban on polygamy and plural marriage was invalid, the State's power to incorporate such provisions in its Constitution and its laws remained. If there was an unlawful coercion in the Enabling Act, the Supreme Court of Utah observed some time ago that there has been no attempt to change the State's laws, "[n]or is such attempt likely." *State v. Barlow*, 153 P.2d 647, 654 (Utah 1944), *appeal dismissed for want of substantial federal question*, 324 U.S. 829 (1945) (per curiam).[4]

In sum, the plaintiff's claim based on the equal footing doctrine lacks merit.

B. *The Free Exercise Clause*

In *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court affirmed a criminal conviction of a Mormon for practicing polygamy and rejected the argument that Congress' prohibition of polygamy violated the defendant's right to the free exercise of religion. Plaintiff argues that *Reynolds* is no longer controlling because

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[4] Utah's laws prohibiting polygamy remain the current law of Utah. See Utah Const. art. III; Utah Code Ann. § 76-7-101 (1978) (defining bigamy and declaring it a third degree felony).

later cases have "in effect" overturned the decision. Brief of Appellant 15. We disagree.

Plaintiff principally relies on *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There the Supreme Court held that the religious belief of the Amish that their salvation requires life in a church community apart from the world necessitated that they be exempted from a state law requirement that children attend public school beyond the eighth grade. *Yoder* explained that for a state to compel school attendance beyond the eighth grade when there is a claim that it "interferes with the practice of a legitimate religious belief, it must appear either that State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. As Chief Justice Burger stated, "[t]he essence of all that has been said and written on the subject [of the Free Exercise Clause] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

The parties have stipulated here for the purpose of the motions for summary judgment that plaintiff's practice of plural marriage is the result of a good faith religious belief. 585 F. Supp. at 1129. The plaintiff has made an undisputed showing that his two wives consented to the plural marriage, and that the wives and five children of the marriages receive love and adequate care and attention and do not want for any necessity of life. Plaintiff points out that the State defendants have not pre-

sented any empirical evidence that monogamy is superior to polygamy, nor has the Utah legislature ever considered whether its anti-polygamy, laws are wise.[5] Hence plaintiff argues that under *Yoder*, summary judgment should have been entered in his favor rather than for the defendants.[6]

We cannot disregard *Reynolds*, however, because in *Yoder* and afterwards the Supreme Court has recognized the continued validity of *Reynolds*. In *Yoder*, *Reynolds* was one of four cases that the Court cited in support of

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[5] The State defendants in their memorandum in support of the motion for summary judgment maintained that because Congress in Utah's Enabling Act required Utah to prohibit polygamy, there is "no indication whatsoever that the Utah Legislature has ever, since statehood was achieved in 1896, attempted to make the fundamentally sociological judgment of whether or not monogamous marriage is empirically superior to polygamy." II R. 359-60. In addition, counsel for the State of Utah stated that:

> As nearly as I can determine at this point, Utah has never seriously considered on a policy basis whether these particular laws [prohibiting polygamy] are wise or not. Utah has not had occasion, because of the federal mandate reflected n the Constitution, to give public policy consideration to these particular issues. Utah has followed without question, as near as I can determine, the mandate of the federal government to maintain this prohibition as a part of its price for statehood.

VI R. 6.

[6] In support of his argument that **Reynolds** is not controlling, plaintiff cites two authorities which question **Reynolds**. **Wisconsin v. Yoder**, 406 U.S. at 247 (Douglas, JJ., dissenting in part) (noting that **Yoder** opens way to give religion a broader base than it has ever enjoyed and even promises that in time **Reynolds** will be overruled); Freeman, **A Remonstrance for Conscience**, 106 U. Pa. L. Rev. 806, 822-26 (1958). **See also** L. Tribe, **American Constitutional Law** 853-54 (1978) (suggesting that after **Sherbert v. Verner**, 374 U.S. 398 (1963), **Reynolds** may be a candidate for reconsideration); **but cf. id.** at 946 & n.19A (suggesting that it is unclear whether the social interest in protecting and strengthening marriages can sustain a **per se** criminal prohibition on extramarital sexual contacts by married persons, but noting that a prohibition on polygamy seems more secure).

the proposition that "[i]t is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powrs." 406 U.S. at 220; *see also id.* at 230. Since *Yoder*, the Court has said that "[s]tatutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973); *see also Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in the judgment) (state may legitimately say that no one who has a living husband or wife can marry); *id.* at 399 (Powell, J., concurring in the judgment) (state has undeniable interest in insuring that its rules of domestic relations reflect widely held values of its people, and state regulation has included bans on incest, bigamy and homosexuality as well as various preconditions to marriage). Moreover, *Reynolds* has been cited with approval since *Yoder*. *E.g.*, *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983); *United States v. Lee*, 455 U.S. 252, 257 (1982); *see also United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 *and* 461 U.S. 909 (1983); *United States v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (per curiam).[7]

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[7] After **Reynolds**, though before **Yoder**, the Supreme Court upheld Mann Act convictions for transporting at least one plural wife across state lines either to cohabit with her or to aid another person in such a project, despite a challenge based on the Free Exercise Clause. **See e.g., Cleveland v. United States**, 329 U.S. 14, 20 (1946). **See also Davis v. Beason**, 133 U.S. 333, 342-44 (1890) (affirming denial

We are in agreement with the district court that the State of Utah

> beyond the declaration of policy and public interest implicit in the prohibition of polygamy under criminal sanction, has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.

585 F. Supp. at 1138.[8] Monogamy is inextricably woven

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[7] **Continued**

of writ of habeas corpus for petitioner convicted of falsely swearing, when registering to vote, that he did not teach, advise, counsel or encourage anyone to commit bigamy or polygamy).

In **State v. Barlow**, 153 P.2d 647 (Utah 1944), the Utah Supreme Court rejected the defendants' free exercise challenge and affirmed their convictions for cohabitating with more than one person of the opposite sex. The Supreme Court, citing **Davis v. Beason, supra,** and **Reynolds v. United States, supra,** dismissed the defendants' appeal for want of a substantial federal question. 324 U.S. 829 (1945) (per curiam). The Court has stated that a dismissal of an appeal on the ground that a substantial federal question is lacking is "a ruling on the merits, and therefore is entitled to precedential weight." **Caban v. Mohammed,** 441 U.S. 380, 390 n.9 (1979); **see also Hicks v. Miranda,** 422 U.S. 332, 344-45 & n.14 (1975). The Court, however, has indicated that a dismissal for lack of a substantial federal question "is not entitled to the same deference given a ruling after briefing, argument, and a written opinion." **Caban v. Mohammed,** 441 U.S. at 390 n.9; **see also Edelman v. Jordan,** 415 U.S. 651, 671 (1974). **See generally** 16 C. Wright, A. Miller, E. Cooper & E. Gressman, **Federal Practice and Procedure** § 4014, at 638-39 (1977); Comment, **The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of** Hicks v. Miranda, 76 Colum. L. Rev. 508 (1976).

[8] Many of the laws of the State of Utah are premised upon monogamy. **See, e.g.,** Utah Code Ann. §§ 30-1-27, 30-1-28 (1976) (limiting right of individual to marry who is under a prior obligation to support minor child or children); **id.** § 30-1-30 (1976) (state policy of increasing possibility that couples will have stable marriage by providing and encouraging use of premarital counseling for those under 19 and

into the fabric of our society. It is the bedrock upon which our culture is built. *Cf. Zablocki v. Redhail,* 434 U.S. 374, 384 (1978) (marriage is foundation of family and society; "a bilateral loyalty"). In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.

C. *The right to privacy*

Plaintiff argues that his constitutional right to privacy prohibits the State of Utah from sanctioning him for entering into a polygamous marriage. Again we disagree.

We find no authority for extending the constitutional right of privacy so far that it would protect polygamous marriages.[9] We decline to do so. *Cf. Paris Adult*

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[8] **Continued**

those who have been previously divorced); **id.** § 30-2-9 (1976) (family expenses and education of children chargeable upon property of both husband and wife); **id.** § 30-2-10 (Supp. 1983) (neither husband nor wife can remove the other or their children from the homestead without consent of the other unless the owner provides suitable alternate homestead); **id.** § 75-21102 (1978) (surviving spouse's intestate share); **id.** § 75-2-201 1978) (surviving spouse's right to elective share); **id.** § 75-2-301 (1978) (rights of surviving spouse who is not provided for in will and was married after execution of will); **id.** § 75-2-401 (Supp. 1983) (surviving spouse's homestead allowance); **id.** § 75-3-203 (Supp. 1983) (outlining surviving spouse's priority among other persons seeking appointment as personal representative during probate).

[9] **See, e.g., Roe v. Wade,** 410 U.S. 113 (1973) (woman's right to abortion); **Griswold v. Connecticut,** 381 U.S. 479 (1965) (married couple's right to use contraceptives); **Doe v. Duling,** ..... F. Supp. ..... (E.D. Va. 1985) (constitutional right of privacy prevents the state from criminalizing the non-prostitutional heterosexual activities of two **unmarried** consenting adults when such activities occur in privacy of home), **appeal docketed,** No. 85-1326 (4th Cir. March 26, 1985).

Theatre I v. Slaton, 413 U.S. at 68 n.15 (few today seriously claim that making bigamy a crime violates the First Amendment or any other constitutional provision).

D. *Laws in desuetude*

Plaintiff further argues that Utah's laws prohibiting polygamy have fallen into desuetude. He says that there have been fewer than 25 prosecutions in Utah since 1952 for such offenses, that there are at least 5,000 to 10,000 polygamist family members in the State, and that during Chief Gillen's thirty year tenure he had never arrested anyone nor seen anyone arrested or prosecuted for violating Utah's anti-bigamy statute. Brief of Appellant 31; Appellant's Reply Brief 15. Thus he says that invoking laws which have long been in disuse to sanction him is a violation of the constitutional guarantees of due process and equal protection, citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *People v. Acme Markets, Inc.*, 334 N.E.2d 555 (N.Y. 1975). *See also United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967). We disagree.

Polygamy has been prohibited in our society since its inception. *See Reynolds*, 98 U.S. at 164-65. The prohibitions continue in full force today.[10] We cannot agree that the discharge of plaintiff for engaging in bigamy violated any constitutional guarantee. The showing made did not establish the enforcement of a "basically obsolete

[10] In our Circuit, see, e.g., Colo. Rev. Stat. § 18-6-201 (1978); Kan. Stat. Ann. § 21-3601 (1981); N.M. Stat. Ann. § 30-10-1 (1978); Okla. Stat. Ann. tit. 21, §§ 881-884 (West 1983); Utah Code Ann. § 76-7-101 (1978); Wyo. Stat. § 6-4-401 (1983). See generally H. Clark, The Law of Domestic Relations in the United States 60-66 (1968).

or an empty law whose function has long since passed." *United States v. Elliott, supra,* 266 F. Supp. at 326. The showing of minimal numbers of prosecutions does not establish an abandonment of the State's laws and an irrational revival of them here. "[M]ere failure to prosecute other offenders is no basis for a finding of denial of equal protection." *United States v. Blitstein,* 626 F.2d 774, 782 (10th Cir. 1980), *cert. denied,* 449 U.S. 1102 (1981); *see also United States v. Salazar,* 720 F.2d 1482 1487 (10th Cir. 1983), *cert. denied,* 105 S.Ct. 789 (1985); *United States v. Dukehort,* 687 F.2d 1301, 1303 (10th Cir. 1982); *United States v. Amon,* 669 F.2d 1351, 1355-56 (10th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982). Selectivity in the enforcement of council laws is subject to constitutional constraints. Nevertheless, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Amon,* 669 F.2d at 1355.

III

Conclusion

In sum, we find no error in the conclusions of the district court and uphold the summary judgment on the merits for the defendants, except as to the United States. In the case of the United States, the judgment in its favor was grounded on the same reasoning applied elsewhere in the court's opinion, namely that no violation of any constitutional rights was established. With that conclusion we agree, but more fundamentally, "[t]he United States, as sovereign, is immune from suit save as it con-

sents to be sued," *United States v. Sherwood*, 312 U.S. 584, 586 (1941), and there is no jurisdictional grant with respect to this controversy as to the United States.[11]

Accordingly, we vacate the order of joinder of the United States. As thus modified, the judgment is in all respects affirmed.

MODIFIED AND AFFIRMED.

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[11] On motion of the State, the district court ordered the United States joined as a party because of the challenge to the constitutionality of the Enabling Act, finding that the Government's presence was necessary and that it could properly be joined under Rule 19(a), Fed.R.Civ.P; even though the Government might not be a necessary party in the strict sense, its presence was appropriate, citing 28 U.S.C. § 2403, **inter alia**. 585 F. Supp. at 1136. However, the Government did not seek intervention as it might have under § 2403, and instead challenged the joinder of the Government on appeal. We see no jurisdictional basis for the joinder of the United States since it has not sought to intervene.

The State of Utah argues vigorously that the Eleventh Amendment bars plaintiff's action against the State and the State officials, and that this position was not waived below. The district court said that the continued presence of the State was ' with its acquiescence," and cited statements of counsel to support that observation. 585 F. Supp. at 1133-34 & n.5. It is true, however, that a State's consent to federal court jurisdiction must be "unequivocally expressed." **Pennhurst State School & Hospital v. Halderman**, 52 U.S.L.W. 4155, 4157 (U.S. Jan. 23, 1984). Since the particular disposition here can have no practical effect on the State appellees in light of our conclusion on the merits, we need not attempt to decide this matter.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

ROYSTON POTTER,

Plaintiff,

vs.

MURRAY CITY, a Municipal corporation, CALVIN G. GILLEN, individually and as Chief of Police of Murray City, MURRAY CITY CIVIL SERVICE COMMISSION, THE HONORABLE SCOTT M. MATHESON, Governor of the State of Utah, THE HONORABLE DAVID L. WILKINSON, in his capacity as Attorney General of the State of Utah, STATE OF UTAH and the UNITED STATES OF AMERICA,

Defendants.

No. C-83-0174C

MEMORANDUM DECISION

CHRISTENSEN, Senior District Judge.

ON MOTIONS

STATEMENT OF THE CASE

This case involves a civil rights claim for damages and declaratory and injunctive relief by a former police officer of Murray City who alleges that the termination of his employment because of his practice of plural marriage violated his right to the free exercise of his religion as protected by the First and Fourteenth Amendments to the Constitution of the United States, contrary to the provisions of 42 United States Code § 1983.

Monetary damages are sought against the City, its Chief of Police, and the Murray Civil Service Commission, and declaratory and injunctive relief is prayed for against the State of Utah and its Governor and Attorney General declaring Utah's laws against plural marriage void and enjoining their enforcement. Because of the claim that the enactment and retention of such laws were mandated by the federal Enabling Act as a condition for admission of Utah into the Union, the United States was joined as a party upon motion of the State.

This case is now before the court upon motions for summary judgment filed respectively by plaintiff, Murray City and the state defendants and a motion for judgment on the pleadings interposed by the United States. Following written briefing, and upon oral argument heard March 2, 1984, all pending motions have been submitted to the court for decision.

FACTS

The third amended complaint of the plaintiff Royston E. Potter, in the light of which the motions before the court must be decided, succinctly states the basic fact structure in substance as follows:

> On September 15, 1980, the plaintiff was employed by the defendant Murray City as a police officer and took an oath to support and defend the Constitution of the United States.
>
> Plaintiff holds a genuine religious belief, faith and commitment in the principle and practice of plural marriage (polygamy).
>
> At all times material to this case plaintiff has had two wives, both of whom have borne a child

or children with plaintiff and for whom he provides love, care, support and maintenance.

The children born of these relationships are not neglected nor are they deprived. Plaintiff's wives, with full knowledge, have consented to plaintiff's plural marriage.

On or about December 1, 1982, plaintiff was terminated as Murray City police officer by the defendant Gillen, Chief of Police of Murray City, at the direction of and with the full consent and knowledge of the defendant Murray City. This decision was affirmed by the defendant Civil Service Commission on February 18, 1983.

Defendants Gillen, Murray City and its Civil Service Commission terminated plaintiff's employment because of plaintiff's religious beliefs and practices and particularly by reason of his plural marriage or cohabitation and for his failure to su.pport, obey and defend Article III, Section 1 of the Constitution of the State of Utah.

Aside from the contention of the defendants that there were other or additional reasons for the termination of plaintiff's employment as a police officer, there is substantial support in the record for the foregoing allegations. In reinforcement or supplementation of them, the parties have formally stipulated for the purposes of the presented motions the existence of the following facts:

On September 15, 1982, the plaintiff Royston E. Potter was actively practicing plural marriage. The practice of plural marriage is the result of a good faith religious belief.

As of November 19, 1982, the plaintiff had two wives, both of whom have consented to this relationship.

The five children born of these relationships are not neglected or deprived.

On September 15, 1980, the plaintiff took an oath of office as a police officer wherein he agreed to support, obey and defend the Constitution of the State of Utah.[1]

There are between 5,000 and 10,000 individual family members of polygamist families currently residing in the State of Utah.

There have not been more than twenty-five criminal prosecutions for polygamy in the State of Utah since 1952.

Plaintiff's religious beliefs are totally immune from state scrutiny.

Plaintiff's wives and children receive adequate care, love and attention and want for no necessity of life.

The Appeals Referee, Appeal Section, Industrial Commission of Utah, Department of Employment Security, in the Matter of Royston Potter's Application for Unemployment Compensation Insurance found, among other things, that the performance of Royston E. Potter as a public officer was exemplary, that his practice of polygamy did not affect his performance as such officer, that the county attorney had refused to prosecute the claimant, that the claimant had initiated legal proceedings to challenge the constitutionality of Utah's antipolygamy law through the courts; that the Murray Police Department's right to discharge the claimant for the conduct in question was not an issue before the department but that "the issue in

[1] As to state defendants the stipulation was, in form, that the foregoing facts were stipulated before the Murray City Civil Service Commission; but the court accepts them as established for the purposes of all of the motions for summary judgment here.

willful misconduct cases . . . is whether the State is justified, under the circumstances, in denying benefits for such conduct."

It was concluded by the Commission that "[a]lthough the claimant's conduct may have justified his discharge, it is only disqualifying if it satisfies the three requirements set forth in . . . the Utah Employment Security Act, [and that] the Appeals Referee is unable to make such a finding and it is, therefore, ruled the department correctly allowed benefits to the claimant." [2]

ISSUES

While rulings upon all of the issues enumerated may not be essential, depending upon the disposition of some of them, they all have been considered in the arguments addressed to the court and have had to be explored to afford assurance of full consideration on the case. Moreover, it has been found helpful to an orderly presentation of the entire problem and of possible assistance in a better understanding from the beginning of the relationship of the various parties to it, to discuss all of the issues in the following order:

I. What are the presumptions, burdens of proof and breadth of inquiry in view of them?

II. Does the Eleventh Amendment bar this suit or the relief, if any, to be awarded, as against the State of Utah and/or its Governor and Attorney General?

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[2] The parties stipulated in effect to the accuracy of the copy of the ruling attached to the stipulation and not expressly to the recited facts as such. Cf. McDonald v. City of West Palm Beach, ... U.S. ....., 52 U.S.L.W. 4457 (1984), rejecting any collateral estoppel effect of related but essentially different proceedings.

III. Do the uncontroverted facts establish a qualified immunity from liability for monetary damages in favor of the defendant Chief of Police and the City's Civil Service Commission because of a good faith reliance upon the constitutionality of their action?

IV. Does Murray City share any such qualified immunity and, if not, could it be liable for monetary damages as well as declaratory or injunctive relief because the dismissal of plaintiff was the result of the policy, custom or usage of the City?

V. Was the United States properly made a party and, if so, with what consequences?

VI. Is Utah's present law against plural marriage any less the established policy of the State, or any less relevant or material to plaintiff's constitutional claims, because of the "compulsion" of the federal Enabling Act as a condition of Utah's statehood or the resulting "irrevocable" nature of Utah's prohibition of plural marriage pursuant thereto?

VII. Has there been a showing of a "compelling state interest" in the prohibition of plural marriage with no less restrictive alternatives consistent with that interest reasonably available to accommodate plaintiff's practice of polygamy?

VIII. Must any compelling state interest in the prohibition of polygamy yield to the plaintiff's religious belief or his right of privacy, equal protection or other fun-

damental right by reason of an appropriate balancing of such rights with the interest of the State?

IX. Is this case ripe for final disposition by summary judgment?

X. In conclusion, what should the order of the court be in disposing of the motions before it?

ANALYSIS AND DISCUSSION

I

It is well established that summary judgment may be granted only where there is no genuine issue of any material fact and the prevailing party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. The party opposing such a motion is entitled to have all facts, including rational inferences, reasonably viewed in the light most favorable to that party. Adickes v. Kress & Co., 398 U.S. 144 (1970); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373 (10th Cir. 1980). Mere conclusions as distinguised from facts do not themselves authorize the approval or rejection of such motions. Luckett v. Bethlehem Steel Corp., *supra,* at 1380 n.7; Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir., 1976); Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975). And the existence of questions of law which it is the court's duty to decide, however difficult, do not warrant the denial of a motion for summary judgment where the determinative facts are without dispute. International Ass'n. of Machinists and Aerospace Workers, Dist. 776 v. Texas Steel Co., 538 F.2d 1116 (5th Cir. 1976), *cert. denied,* 429 U.S. 1095 (1977);

Spark v. Catholic University of America, 510 F.2d 1277 (D.C. Cir. 1975).

Freedom of religion of course is a fundamental, constitutional right. The plaintiff argues that a statute which impinges upon a fundamental right secured by the Constitution is "presumptively unconstitutional." On the other hand, the defendants assert that there is a presumption that laws prohibiting plural marriages are constitutional, having been sustained by the leading case of Reynolds v. United States, 98 U.S. 145 (1879). Plaintiff counters that the evolving mores and attitudes of society and the erosions of the *Reynolds* rationale by subsequent decisions of the Supreme Court have destroyed the precedential value of that case. The presumptions thus tend to neutralize each other and in that sense commend both an independent evaluation of plaintiff's constitutional claims based upon the latest pertinent decisions of the Supreme Court, and a reappraisal of the rationale of *Reynolds* in contemporary context without being shunted in this process by supposed presumptions. So far as I can discover, there has been no such analysis in the cases of the basis of *Reynolds* to date.

Plaintiff asserts also that in view of changed conditions it is the burden of the defendants to demonstrate a "compelling state interest" in the prohibition of polygamy. For reasons hereafter to be developed, I believe that is so; but I do not agree that such interest must always be shown by empirical or testimonial evidence as distinguished from matters of precedent, principle, concept, history, legislative determination, or public policy of which the court may take judicial notice.

Nor does this case involve an issue of the validity of theological doctrine. The only significant point of doctrine has been set at rest by the stipulation of the parties that the plaintiff practices plural marriage as the result of a good-faith religious belief. One does not have to prove, and in the realm of theology or metaphysics cannot prove according to rules of evidence, the validity of his religious faith in order to have the protection of the First Amendment properly applied; nor do others need to disprove that validity to question the application of claimed First Amendment protections improperly invoked.

To fully accept the stipulation of the parties, one need not, indeed must not, be oblivious to the teaching of history that such a belief has been sincerely entertained and resolutely asserted by action before.[3]

Irrespective of whether others have deemed that their sincere religious belief had to yield to an interpretation of the Constitution, authoritative at that time, as a matter of compulsion or as an aspect of a broader religious conviction,[4] or whether a proper interpretation of the

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[3] See Whitney, **Popular History of Utah**, 332-490 (1916); Neff, **History of Utah**, 555-563 (1940); Poll and Campbell, **Utah's History**, 283-293 (1978); Arrington and Bitton, **The Mormon Experience**, 178-205, 243-252 (1979).

[4] See Thomas G. Alexander, "The Church and the Law," Dialogue (No. 2), 123, 128 (1966):

> Some maintain that because Mormons were law abiding they gave up plural marriage after the Supreme Court declared the anti-polygamy acts constitutional (citing James E. Talmage A Study of the Articles of Faith: Being Consideration of the Principle Doctrines of the Church of Jesus Christ of Latter-Day Saints, 424-425 (1960)).

Constitution presently will accommodate plaintiff's practice and render it lawful, the duty of this court is the same—to seek that proper interpretation purely as a matter of constitutional law, but with sensitivity to the fact that plaintiff's religious practice is, in truth, one in which he sincerely believes.

It will be helpful in understanding the constitutional issues to have in mind at the outset general principles outlined in Phyler v. Doe, 457 U.S. 202, 216-17 (1982). Where a legislative classification works to the disadvantage of a constitutionally sensitive class—based, for example, on race, nationality, alienage or religious affiliation—the courts may unhold the classification only if it is precisely tailored to serve a compelling governmental interest. If the legislative classification impinges upon the exercise of a fundamental personal right, the classification must meet the same exacting "compelling interest"

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[4] **Continued**

> But long after the 1879 Reynolds decision, Church members brought to the bar for sentencing told federal judges that the law of God was higher than the law of the land and deserved prior obedience. The Manifesto officially ending polygamy as Church practice was not issued until 1890, and excommunication for practicing plural marriage did not come until 1904 . . . .
>
> As an historian, I see the problems of the 1870's and 1880's as a conflict of two systems of law, tradition, and morality, which, because they were mutually incompatible had to be reconciled in some way. As a devoted member of the Church, however, I see in the action of the federal government a manifestation of God's will. The Constitution, which the Church holds to be divinely inspired, demands the separation of church and state. The power exercised before 1890 to compel adherence to the Church's political and economical policies infringed upon that separation. The two principles, which were self-contradictory, could not both stand; and the Lord chose to have the Church abide by the Constitution.

standard. If the legislative classification neither impinges on a fundamental personal right nor employs an inherently suspect classification, the courts will generally uphold the classification if it is rationally related to a legitimate state interest.

Here our analysis should not falter on the question of whether the employment of plaintiff as a police officer or even his claimed right in general to practice polygamy is a fundamental one. The fundamental right implicated by the facts and law of this case is the right to practice polygamy in pursuance of a sincere religious belief. As such, the defendants have the burden of showing that the infringement of it is warranted not merely by a rational justification but by a compelling state interest. *Cf.* Wilson v. City of Littleton, Colorado, ... F.2d ..... (10th Cir. No. 83-2150, Apr. 16, 1984).

The issue in short, then, is whether it has been shown upon the basis of undisputed facts in the record or of which the court may take judicial notice that either plaintiff or any defendant as a matter of law is entitled to summary judgment, considering the burden upon the part of the defendants to demonstrate a compelling state interest supporting the dismissal of the plaintiff because of his practice of polygamy as a sincere religious belief.

It will be helpful to have before us immediately these provisions of law in pertinent part:

Section 1983 of Title 42, U.S.C. (Civil Rights Act)

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

First Amendment of the United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment of the United States Constitution

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

An Act to Enable the People of Utah to Form a Constitution and State Government, and to be Admitted into the Union on an Equal Footing with the Original States 28 Stat. 107, Act of Congress of July 16, 1894

The Enabling Act instructed the Utah Constitutional Convention as a condition to Utah's admission into the Union to

> . . . provide, by ordinance irrevocable without the consent of the United States and the people of said state:

> First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship: Provided, that polygamous or plural marriages are forever prohibited.

The Constitution of Utah

ARTICLE III

ORDINANCE

The following ordinance shall be irrevocable without the consent of the United States and the people of this State:

[Religious toleration—Polygamy forbidden.]

First: Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous of plural marriages are forever prohibited.

Utah Code Annotated, 1953

§ 76-7-101. Bigamy—Defense—Testimony.—(1) A person is guilty of bigamy, when knowing he has a husband or wife or knowing the other person has a husband or wife, he purports to marry another person or cohabits with another person.

(2) Bigamy is a felony of the third degree.

II

The State of Utah contends that it is immune from suit in this case by virtue of the Eleventh Amendment which provides that "[t]he Judicial power of the United

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." It is well established that this prohibition extends also to a suit against the state brought by one of its own citizens and that the provision cannot be circumvented by naming officers of the state as parties rather than the state as such.

Lengthy briefing has been devoted to the question whether injunctive relief as distinguished from monetary damages having direct impact upon the state treasury is permitted, a controversy in which salvo upon salvo of authorities have been fired. Neither side has been seriously injured nor has the court, it is to be hoped. Both sides are partly right, but it now appears that this makes little difference in the disposition of the case.

The latest decision of the Supreme Court on the subject, Pennhurst State School & Hospital v. Halderman, ... U.S. ....., 52 U.S.L.W. 4155 (Jan. 23, 1984), reiterates with emphasis prior holdings that the principle of sovereign immunity under the Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest, regardless of whether the suit seeks damages or injunctive relief. But *Pennhurst* recognizes the continuing validity of the exception carved out in the landmark decision of Ex Parte Young, 209 U.S. 123 (1908), enabling a federal court consistent with the Eleventh Amendment to enjoin state officials under certain conditions to conform their future conduct to the requisites of federal law even though such an injunction might have ancillary effect on the state treasury.

While the validity of Utah's prohibition of plural marriage is necessarily attacked by plaintiff in attempting to impeach his dismissal as a police officer and he has asked that the state be enjoined from enforcing that prohibition generally, it appears that he himself has not been prosecuted for any criminal violation and the State had no direct involvement with his discharge. Indeed, he complains in another connection that the prohibition is not now being enforced at all by the State through criminal prosecution. Thus, plaintiff's standing to seek injunctive relief against the State and its officers, apart from the issue of the validity of his discharge, seems questionable; the gist of his claim against the State pertains only to the matter of relief should the court determine the discharge to be unconstitutional. Irrespective of whether the latter point may be mooted, the continued presence of the State with its acquiescence,[5] besides providing a standby possibility of recourse in some nonmonetary way, has contributed to the court's enlightenment on the constitutional issue.

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[5] During the State's oral argument on its motion to dismiss the following occurred:

> Mr. Tinker (representing the State): With the two state officials now added as defendants in this case and given the federal case law on those kinds of issues, as I understand it, it is unimportant and I do not assert it at this point.
>
> The Court: You waive your position to dismiss the State of Utah on the ground of the Eleventh Amendment?
>
> Mr. Tinker: I still assert the motion to dismiss the State of Utah on the ground that it is not a person subject to section 1983 actions.
>
> The Court: But actually, with the State present and the Eleventh Amendment matter being waived, your motion really is that relief be denied as against the State of Utah?
>
> Mr. Tinker: Yes.

III

The individual Murray City officers contend that irrespective of the constitutional validity or invalidity of the state law as they applied it, they are not personally liable to plaintiff because they acted in good faith.

A qualified immunity of executive officers, whom the law encourages to exercise their best judgment without fear of liability so long as they act in good faith, has long been recognized. Until recently it has been questionable whether this immunity is to be measured by a subjective standard of good faith or an objective one. If the question of good faith depended upon the subjective understanding or belief of an official involved, it might be difficult to resolve the issue of immunity on summary judgment. Motive or intent ordinarily is regarded as involving a question of fact. However, the Supreme Court resolved this problem as it bears upon the present case by holding that an objective standard applies. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In that case it was stated:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citations omitted]
>
> Reliance on the objective reasonableness of an official's conduct, as measured by references to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately

> may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.

Upon the basis of this objective standard, I have no hesitancy in holding that the conduct of the city officers as pursued in good faith, did not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time of plaintiff's dismissal.

The landmark decision in the area of freedom of religion in connection with polygamy is Reynolds v. United States, 98 U.S. 145 (1879), *supra,* in which the Supreme Court confirmed a conviction even though the defendant believed that the practice of polygamy was his religious duty and of divine origin and he had received permission from the authorities of his church to enter into the polygamist marriages.

The defendants assert that this case under the doctrine of *stare decisis* controls the disposition of the present case in their favor. The plaintiff contends that because of the erosion of its rationale by subsequent decisions of the Supreme Court and changing mores and attitudes in modern society, *Reynolds* need not be followed. It is upon the latter theory that plaintiff would have the court distinguish or overrule that case upon formal presentation of the issue, extensive investigation, pretrial proceedings, briefing, oral argument and study following such advisement.

But what the court might perceive in the culmina-

tion of that process to justify it in pursuance of its responsibility to decide the case is quite different from what defendants should have known as a basis for questioning the application of *Reynolds* and related decisions to their dismissal of plaintiff at the time this occurred.

Within the presumed knowledge of the defendants as reasonable persons at the time of the plaintiff's dismissal, there was in existence not only a state law against polygamy but a state constitutional provision proscribing that practice pursuant to a federal statute. There was plaintiff's oath to support, obey and defend the Constitution and his known obligation to comply with the criminal law at least to the extent that it was valid. There was reasonable basis for belief that plaintiff was a felon in the light of that law. None of those provisions prohibiting polygamy had ever been held to be unconstitutional. On the contrary, a long line of decisions beginning with *Reynolds, supra,* had either expressly approved statutes forbidding the practice of plural marriage, or approved them impliedly or in principle, or cited *Reynolds* in other contexts as subsisting authority in the area of the free exercise clasue of the First Amendment. *See, e.g.,* Miles v. United States, 103 U.S. 304 (1881); Cannon v. United States, 116 U.S. 55 (1885); Snow v United States, 118 U.S. 346 (1886); Davis v. Beason, 133 U.S. 333 (1890); Late Corporation of Latter-Day Saints v. United States, 136 U.S. 1 (1890); State v. Hendrickson, 245 Pac. 375 (Utah 1926); Lovell v. City of Griffin, Ga., 303 U.S. 444-449 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); State v. Barlow, 153 P.2d 647 (Utah 1944), *appeal dismissed for want of substantial*

federal question, 324 U.S. 829 (1945), *reh'g. denied*, 324 U.S. 891 (1945); Cleveland v. United States, 146 F.2d 730 (10th Cir. 1945); State v. Musser, 175 P.2d 724 (Utah 1946); Cleveland v. United States, 329 U.S. 14 (1946); *In Re* State in Interest of Black, 282 P.2d 887 (Utah 1955); Braunfeld v. Brown, 366 U.S. 599 (1961); Wisconsin v. Yoder, 406 U.S. 205 (1972); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Carroll, 567 F.2d 955 (10th Cir. 1977); United States v. Ogle, 613 F.2d 233 (10th Cir. 1979); United States v. Lee, 455 U.S. 252 (1982); Bob Jones University v. United States, ... U.S. ....., 103 S.Ct. 2017 (1983).

At no time has *Reynolds* been overruled by the Supreme Court. The only comment called to my attention which intimates that it ultimately may be is to be found in Wisconsin v. Yoder, 406 U.S. 205 (1972), *supra*, Justice Douglas dissenting at 247:

> Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time Reynolds will be overruled.

Reserving for later discussion the related question of whether this court should or can depart from the teachings of *Reynolds* in light of the contemporary setting, it is clear to me that persons in the position of Chief Gillen and the Civil Service Commission could not reasonably have known that Utah's laws against polygamy

were unconstitutional and invalid at the time of plaintiff's dismissal.

In disposing of the question of immunity at this point, I am mindful that particularly upon the appellate level that decision is reserved until after the basic issue of an alleged constitutional violation has been addressed. Martinez v. California ,444 U.S. 277, 284 (1980); Dock v. Latimer, ... F.2d ..... (10th Cir. No. 82-2558, March 23, 1984). Yet, the answer to the question of immunity here is relatively clear and its consideration with that of some other related matters supplies a convenient starting point for discussing the legal impact of changing customs, attitudes and judicial concepts in light of which plaintiff claims that this court should hold that plaintiff's constitutional rights have been violated, *Reynolds* notwithstanding.

IV

The question of the immunity of the City itself also can be shortly answered to lend point to the discussion that follows. The City does not share the good faith immunity of its officers and would be liable to the plaintiff for damages if his constitutional right had been infringed by them. Owen v. City of Independence, 445 U.S. 622 (1980).

It is true that liability cannot be established upon the doctrine of *respondeat superior* itself, but only on the basis of conduct by its officers that is in execution of some policy, ordinance, regulation, decision or custom of the City itself. For the purposes of section 1983 police department policies can be said to be the policies of the

City. Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980). Beyond this, the record before me leaves no room to question that the decision of the Chief of Police as affirmed by the Civil Service Commission to discharge plaintiff because of the violation of his oath and the law against polygamy carried out the official policy of Murray City.

V

The United States was made a party to this suit upon the finding that its presence was necessary for a just adjudication and that it could properly be joined under Rule 19(a) of the Federal Rules of Civil Procedure, there being a challenge to the constitutionality of the federal Enabling Act, *supra*. More generally, it was the court's belief that even though the government might not be a necessary party in a strict sense, its presence was appropriate either to afford opportunity to be heard concerning its possible interest, or to renounce any such interest, or as an *amicus curiae*. *Cf.* Associated General Contractors v. Laborers International Union, 476 F.2d 1388 (Em. App. 1973). *See also* 28 U.S.C. § 2403, concerning intervention of the United States in an action where the constitutionality of any act of Congress affecting the public interest is drawn into question.

The United States contends that it was improperly joined and that no case or controversy existed between it and the plaintiff. It further argues that any link between the Enabling Act and plaintiff's claim of unconstitutional discharge from employment is extremely remote, and that plaintiff's alleged fear of prosecution for polyg-

amy is unreal because he has never yet been prosecuted and contends himself that Utah's law against polygamy is in "desuetude." Alternatively, it has moved for judgment on the ground that the prohibition of polygamist marriages infringes no constitutional interest of the plaintiff. Its final contention is that plaintiff has no constitutional right to practice plural marriage. While a reluctant party, the United States did not accept the invitation of the court, with a suit to quiet title analogy in mind, to disclaim interest in the litigation. In fact its counsel professed to have no view as to whether the Enabling Act continues to bind the State of Utah with respect to prohibiting the practice of polygamy.

Under the peculiar circumstances here, I believe that it was proper for the court thus to ascertain the substance —or in this one respect the opaqueness—of the Government's position before coming to a conclusion as to what, if any, bearing the federal Enabling Act has upon the "compelling state interest" issue central to this case.

VI

In contending that the United States should be made a party, the state defendants argued that Utah's law can be directly traced to the action of the United States in passing the Enabling Act. Its counsel stated among other things:

> Utah has not had occasion, because of the Federal Mandate reflected in [its] Constitution, to give public policy consideration to these particular issues. Utah has followed without question, as near as I can determine, the mandate of the fed-

> eral government to maintain this prohibition as a part of its price for statehood.

Tr. of arg. on Motion to Dismiss Aug. 22, 1983, at 6.

Despite such argument, and the invitation it implies to extrapolate some weakening of the State's commitment to its own laws, I have concluded that the suggestion of "coercion" is beside the point. Utah was not thus made a second-class state whose laws have different legal or constitutional consequence than the similar laws of other states.

" '[T]his union' was and is a union of states, equal in power, dignity, and authority, each component to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." Coyle v. Smih, 221 U.S. 559, 567 (1911). *See also* Baker v. Carr, 369 U.S. 186, 226 n.53 (1962). It is a fundamental rule of constitutional law that the sovereign power of a state "may not be constitutionally diminished, impaired or shorn away by any conditions, compacts, or stipulations embraced in the acts under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." Coyle v. Smith, *supra,* at 573. *Cf. State v. Barlow,* 153 P.2d 647, 654 (Utah 1944).

The State of Utah, accordingly, has had full power since statehood to enact or amend in the manner provided by its own laws, any constitutional or statutory provisions dealing with the subject of marriage consistently with the Constitution of the United States as the supreme law of the land. The prohibition of polygamy as pro-

vided by its Constitution and laws, continues to be its settled public policy as does its commitment to monogamy as the cornerstone of its regulation of marriage, about which are clustered enumerable supportive laws passed by its legislature over the succeeding years.

VII

The right to worship according to the dictates of one's own conscience and reason and to be free from molestation or restraint in his person, liberty, or estate in such worship, is a natural, fundamental and inalienable right, available to every individual, subject only to a proper exercise of the police power when action is coupled with belief. Freedom to believe or not to believe is absolute. Freedom to act, howevr, is not absolute but limited or qualified by the power of the state within reasonable limits to protect society pursuant to a compelling state interest. Particularly in the field of marriage and domestic relations has the State valid concerns with religiously motivated action to the extent of a compelling public interest.

The Constitution's protection of religious freedom derives most directly, of course, from the First Amendment. This amendment gains application to state and local governments through the Fourteenth Amendment's due process clause. That states and localities should be able to effectively exercise police powers to benefit their citizens is implicit throughout the Constitution and is explicit in the Tenth Amendment providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

These general propositions are firmly established and need no citation of authority as we proceed to define and apply the compelling state interest test bearing directly upon the issues in this case.

When a statute in exercise of the police power impinges upon fundamental rights, the court examining the statute must employ a strict scrutiny test requiring a compelling state interest and a showing that no less restrictive alternatives are reasonably available. Wisconsin v. Yoder, 406 U.S. 205 (1972); Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980).

Murray City has contended that if any compelling interest test is to be applied it must be the compelling interest of the City in having its police officers comply with the criminal law and their oaths of office. This argument must be rejected as an over-simplification or begging of the question. To discharge an otherwise qualified and efficient officer because he forthrightly resisted an unconstitutional law would itself be unconstitutional. Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983). The controlling question is whether the law plaintiff violated as applied to him was constitutional.

Insufficient also in and of itself is the position of the State that there is a compelling state interest in prohibiting polygamy because of the many other adjustments that would have to be made in state laws to accommodate that practice. Such cases as Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), and Miranda v. Arizona, 384 U.S. 436 (1966), teach us that the bother

of responding to constitutional mandates does not justify their disregard. Nor is the State's argument sound that there is no fundamental right to the practice of polygamy as such and therefore only the rationality standard is applicable. The fundamental right plaintiff relies upon is that of freely exercising his religion; there clearly must be a compelling state interest to warrant the impairment of that right. It is not sufficient to appraise the practice of polygamy separately on the basis of its conflict with law.

Reynolds may have suggested this latter approach.[6] But reserving for the present a consideration of what the controlling rationale of that decision really was, we proceed to the testing of its conclusion in the light of contemporary authority.

It has been said that states have an "absolute right to prescribe the conditions upon which marriage . . . shall be created . . . ." (Zablocki v. Redhail, 434 U.S. 374, 399 (1978); Powell, J., concurring, quoting Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878).) In exercising that right, the state "represent[s] the collective expression of moral aspirations" and there is "an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Id.*

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[6] It was stated:

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances

(Powell, J., concurring). States have traditionally passed laws regulating marriage which include "laws on incest, bigamy, and homosexuality, as well as various preconditions to marriage such as blood tests." *Id.* As stated in Maynard v. Hill, 125 U.S. 190, 205 (1888), "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."

The State of Utah beyond the declaration of policy and public interest implicit in the prohibition of polygamy under criminal sanction, has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.

In attempted avoidance of this fundamental point, plaintiff has suggested "alternatives" by which he says his practice of polygamy might be accommodated to the fundamental interest of the State. He argues that "minor modifications" in these laws and those related to them, rather than the wholesale overhaul of the system apprehended by the State, would accomplish an appropriate balance. Individuals then, it is contended, "could freely exercise their religious beliefs without governmental interference and the interests of the State would be served without placing an undue burden on governmental functions." Plaintiff's basic solution would be the exemption of all persons with a sincere religious belief in polygamy from any prohibition of its practice.

The complications that would be encountered in the revision of the general legal system in adjustment to this "solution," the avoidance of which I have found not to be sufficient per se to establish a compelling state interest, at least suggest the sweep of the difficulties that would be encountered. But the real problems, practical, legal, conceptual, social and assuredly constitutional, would only start with these. *Cf.* United States v. Lee, 455 U.S. 252 (1982), *supra.*

It would be the height of naivete to suppose that the lawful practice of polygamy thus could be limited to those of the plaintiff's faith, leaving aside the problem of the false assertion of religious motivation for physical gratification. The gate would be open by the developing trend of decision to everyone who might desire more than one wife at a time on the basis of his own particular religious belief. As James Madison said: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." Quoted in Everson v. Board of Educ., 330 U.S. 1, 66 (1947). Under the free exercise clause, coercion in matters of worship, prayer and belief may be unconstitutional whether directed against the individual who merely refuses to worship "correctly" or against the individual who opposes the idea of worship altogether. *See* Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion under the First Amendment," 45 U. of Chicago L. Rev. 805, 810 (1978).

The term "religion" is being given ever increasingly

broad scope since the formulation of this definition in Davis v. Beason, 133 U.S. 333 (1890):

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect but is distinguishable from the latter.

In United States v. Seeger, 380 U.S. 163, 176 (1965), which while dealing with a conscientious objector case may presage a constitutionally applied definition of infinitely broader scope, this formulation is suggested: "A sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exception . . . ."

In view of these and other related developments, a commentator who has suggested that *Reynolds* should be critically reexamined has this "solution" for a seemingly insoluble problem:

> A definitional approach to religion based solely on the individual's own characterization of his belief might appear to be judicially illimitable. An even less desirable alternative, though, is a formulation that would permit the Court to prescribe the parameters of religious faith. This dilemma may be resolved, and the meaning of "religion" minimally objectified, by testing a claimant's characterization of his beliefs against a traditionally accepted notion of religion as involving duties and obligations to conform to the standards of a uni-

> fied belief system that cuts across and directs more than a single aspect of an individual's life.

Merel, supra, at 831, 842. Another commentator has suggested that "legalized polygamy may be one of the future shocks that will have to be faced in a rapidly changing society" because of the shift from shared values of the Nineteenth Century to subjectivization of values in the later part of the Twentieth Century and the "[m]ore tolerant social attitudes toward homosexuality, adultery, obscenity, prostitution, and unusual marriage styles . . . ." Dyer, "The Evolution of Social and Judicial Attitudes Towards Polygamy," 5 Utah Bar Journal, 35, 45 (Nos. 1-2, 1947). Concentration upon supposedly comparable practices suffered by modern society, if not approved, is beguiling; it misses the point of the compelling state interest in the prohibition of polygamy as opposed to monogamy which cannot be accommodated by mere regulation of the former.

There appear to the court to be no reasonable alternatives to the prohibition of the practice of polygamy to meet the compelling state interest found in the maintenance of the system of monogamy upon which its social order is now based. Any broad exception to that prohibition in cases of polygamy sincerely practiced as a "religious" belief would engulf the prohibition itself with ever extending and complicating exceptions based largely on subjective claims, irremediably eroding the police power of the state and its compelling interest. "[T]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." United

States v. Lee, *supra,* at 259. While religious action as well as religious beliefs can often be accommodated, there is a point at which accommodation would radically restrict the operating latitude of the legislature. Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

VIII

The compelling state interest that has been found may be enough, for if the interest is "compelling" it conceptually may subsume the right to prohibit religiously motivated action which is repugnant to that interest.

Yet, the plaintiff has suggested that apart from the free exercise clause of the First Amendment, or perhaps in connection with it, his right to privacy or some other fundamental right also must be considered and balanced against the City's right to discharge him for his practice of polygamy, without that practice being deemed inimical to his efficient service as a police officer.

In principle, the rejection of plaintiff's complaint for alleged interference with the "free exercise" of his religion should dispose of the case without reference to any less specifically protected right based upon the same practice. Plaintiff has disaffirmed any claim that he was denied the equal protection of the laws. While such authorities have been cited in the argument, it is clear that nothing in Whalen v. Roe. 429 U.S. 589 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967) and Griswold v. Connecticut, 381 U.S. 479 (1965), support the contention that his right to privacy has been invaded.

Plaintiff does assert that his performance as a police officer was not adversely affected by his practice of polygamy and the City counters with the argument that only so long as the practice was not publicly known did it fail to have impact. But his practice is in essential nature of public one. And in essence his own position is that he has a right to engage openly in a polygamous relationship with the acceptance of society and particularly his superiors in the police force.

Plaintiff has not encountered his present difficulty simply by privately cohabiting with others. There was no right to privacy infringement detected in a statute authorizing a teacher to be fired for engaging in public homosexual activity, the court observing that the statute does not punish acts performed in private. "Thus the right to privacy, whatever its scope . . . is not implicated." National Gay Task Force v. Board of Education of the City of Oklahoma, ... F.2d ..... (10th Cir. No. 82-1912, Mar. 14, 1984). It has long been held that the Utah statute prohibiting plural marriage or "cohabitation" uses the word cohabitation not in a furtive or private sense, but as referring to the "living together as husband and wife." State v. Barlow, 153 P.2d 647 (Utah 1944), *supra*. *Cf*. Briggs v. North Muskegon Police Department, 563 F.Supp. 585 (W.D. Mich. 1983).

If, after the foregoing critical examination of the compeling state interest, there must be a further balancing of it with the impact of its advancement upon the situation of plaintiff and those in his position (*see e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v.

Yoder, 406 U.S. 205, 214 (1972), *supra;* Thomas v. Review Board of Ind. Employment Security Division, 450 U.S. 707 (1981) and Grosz v. City of Miami Beach, Florida, 721 F.2d 729 (11th Cir. 1983)), the conclusion would not be altered.

Putting into the scale the nature of the conduct for which plaintiff was dismissed, apart from his insufficient defense of that conduct, the position of the defendants is not weakened.

It is suggested in Kelley v. Johnson, 425 U.S. 238 (1976), that in some instances the conduct of police officers can be more severely restricted than that of private individuals. The plaintiff violated his oath to support the Constitution and laws of the State of Utah. He held himself out in the defendants' reasonable viewpoint as a felon and emphasized this by his insistence upon publicly continuing his practice as of right. To say under such circumstances that this did not affect his value and performance as a police officer would be unrealistic.

The determination by the State Department of Unemployment Security that plaintiff's practice of polygamy did not justify the denial of unemployment compensation is of little significance here in view of the different question involved and the express rejection by the State Supreme Court in a later case of the agency's rationale that the violation of the law and his oath which may have sufficiently authorized a police officer's discharge did not so bear upon the performance of his duty as to disqualify him for unemployment compensation as well. Clearfield

City v. Department of Employment Security 663 P.2d 440 (Utah 1983).

As in United States v. Lee, *supra*, a religion based exception to the challenged law would be too costly. Without such exception the burden on religion would be infinitely less. The very nature of the religious practice involved, never viewed by the courts thus far as innocuous, much less laudible, weighs at most only slightly as compared with the State's firm and intricately implemented commitment to the system of monogamy.

I have largely ignored in this analysis the holding of *Reynolds* and its basic teaching, being persuaded that I should take a fresh look at the problem from the viewpoint of the more current authority and in the light of present societal conditions and attitudes. Yet, my analysis with due consideration for balance cannot properly be closed without reverting to that decision. It still remains the decision of the highest court of the land and even though it were not observed for its authority it must be considered for its reasoning to the extent persuasive and not inconsistent with later rulings of the Supreme Court. Disregarding its suggestion that polygamy should be barred as subversive to good order for the same reason that human sacrifice and Suteeism would, its oversimplification of a proper belief/action analysis of First Amendment problems (*cf., e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)), and its seeming insensitivity in passing moral judgment on the sincerity of religious belief, there yet remains in *Reynolds* a sound basis for the modern compelling interest analysis found to be controlling in the present case.

The gist of the holding in *Reynolds* is supported by this reasoning that continues to be a good law:

> In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature, a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal . . . .
>
> [T]here cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

IX

While plaintiff contends that this case is ripe for summary judgment in his favor, he asserts that in any event the defendants' motions for summary judgment cannot properly be granted because to do so would require a finding of additional facts that can be established only upon trial. The "facts" involved in this argument, plaintiff's counsel explained at the oral argument without specifically defining them, relate to the question of a compelling state interest. A notion of their nature may be gathered from some of plaintiff's unsuccessful de-

mands for admissions during pretrial discovery.[7]

I am of the opinion that proof negating such claimed facts or establishing any other material matter of which the court cannot take judicial notice would be neither practical, helpful nor necessary for the final disposition of this case.

It may be that in some instances the exploration through evidence of the bases of societal judgment would encourage more informed or careful decision making. But it has been well pointed out that when no empirical research may exist or lend itself to the establishment of legislative facts, or there may be substantial barriers to conducting competent research on a particular question, a conclusion based upon an empirical assumption that might imperfectly result is far less justified than an approach to a decision which turns upon the intrinsic worth of values and principles. Shuman, "Decision making un-

---

[7] That the people of Murray City, the State of Utah, and the United States have not been harmed as a result of the practice of plural marriage for religious reasons; there is no empircal data showing that the members of a polygamist family are more likely to require social welfare than members of a monogamous family in the same geographical locations or that members of a polygamist family are more likely to suffer physical or mental problems; that there is no empirical data showing that members of a polygamist family receive less love or attention than do members of a monogamous family in the same geographical location or evidencing harm to American sosiety that has resulted from the practice of plural marriage; that the high rate of divorce in the United States has often turned today's American familial relationships into a form of serial polygamy; that polygamy is a morally acceptable lifestyle in many cultures of the world; that moral attitudes opposing polygamy in the western Judeo-Christian culture are the direct results of the religious attitudes of the Holy Roman Empire; and that Murray City and the State of Utah have no compelling interest in prohibiting cohabitation relationships between consenting adults when done for religious purposes.

der Conditions of Uncertainty," 67 Judicature No. 7 (February 1984), 826. *See also* Fed. R. Evid. 201(a); Davis, "An Approach to Problems on Evidence in the Administrative Process," 55 Har. L. Rev. 364, 402-416 (1942). In any event, I have concluded that the question of a compelling public interest in this case is one of law to be determined by the court.

X

In summary, I conclude:

1. The defendants are entitled on the uncontroverted record to summary judgment of "no cause of action" on plaintiff's claims.

(a) As to the State defendants, plaintiff has established neither that state law against polygamy nor his dismissal as a police officer violated his constitutional rights, and in any event the State defendants have established their immunity from liability to the plaintiff pursuant to the Eleventh Amendment to the Constitution of the United States.

(b) As to the defendant Chief of Police and the Civil Service Commission plaintiff has failed to establish that his dismissal as a police officer violated any constitutional right, and those defendants established immunity from monetary liability by reason of their good-faith reliance upon the constitutionality of state law.

(c) As to the defendant Murray City, while no good faith immunity exists in its favor under current law, plaintiff has failed to establish that his dismissal as a police officer violated any constitutional right.

(d) As to the defendant United States, plaintiff has failed to establish its violation of any constitutional right of plaintiff.

2. Plaintiff's practice of polygamy is not protected by the First Amendment guaranteeing the free exercise of religion insofar as concerns the validity of his dismissal from the Murray City Police Force.

3. The practice of polygamy by plaintiff is not a fundamental right constitutionally protected by the Free Exercise Clause of the First Amendment or any right of privacy or liberty under the Fourteenth Amendment, or at all, as against the state Constitution and law prohibiting plural marriage and the compelling state interest supporting them.

4. Plaintiff did not have a constitutional right to retain his employment under the circumstances of this case and whatever rights he may otherwise enjoy, his right to employment as a police officer must yield to the compelling state interest in prohibiting polygamy and to the right of Murray City to require its police officers to conform their conduct to state criminal laws according to their oaths.

5. Summary judgment should be entered in harmony with these conclusions.

Counsel for the defendants shall submit to the court within ten days a proposed judgment after submission to opposing counsel in an effort to agree on its form. Any such agreement will not be deemed a waiver in any respect of the substantive positions of the parties. Objection if any to defendants' proposed form to the extent it cannot be resolved by agreement shall be filed within two weeks, will be heard, and the form of judgment settled before the court, May 15, 1984, at the hour of 10:00 o'clock a.m.

Dated this 27th day of April, 1984.

A. Sherman Christensen
Senior United States District Judge

APPENDIX C

THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

Appeals Section
Decision of Appeals Referee

Royston E. Potter
3724 Osteen Circle
Magna, Utah 84044
Murray City Corporation (Appellant)
5025 South State
P.O. Box 7520
Murray, Utah 84107

S.S.A. No. 216 64 3716
Case No. 82-A-6361

APPEAL FILED: December 31, 1982

APPEARANCES: Claimant and Employer

DATE OF HEARING: March 1, 1983

PLACE OF HEARING: Salt Lake City

The Department's decision dated December 21, 1982, allowed unemployment insurance benefits effective December 5, 1982, on the grounds the claimant was not discharged for an act or omission in connection with his employment which was deliberate, willful or wanton and adverse to the employer's rightful interests. Section 35-4-5(b)(1) of the Utah Employment Security Act provides as shown on the attached sheet.

FINDINGS OF FACT:
Prior to filing a claim for unemployment insurance benefits effective December 5, 1982, the claimant earned

$1,300 a month working as an police officer for Murray City where he was employed from September 15, 1980, to December 1, 1982. The claimant was terminated from his employment because he was determined to be in violation of Section 11-3(K) of the Murray City Civil Service Commission Rules and Regulations. The claimant practices polygamy. The practice of polygamy (Bigamy) is prohibited under 76-6-101 of the Utah Code Annotated, 1953, as amended and constitutes a felony of the third degree. The claimant has two wives and children by both. He has practiced polygamy since April, 1980, and was so engaged when he was hired by Murray City Police Department. He considers his practice of polygamy to be a religious conviction and believes such practice is essential for his proper relationship with deity.

The claimant's performance as a police officer was exemplary. He had been named Murray City Employee of the Month and his competence as an officer was unquestioned. His practice of polygamy did not affect his performance as a police officer. He accepted all assignments and carried out the directives given by his supervisors.

The claimant at the time he was hired by Murray City took an "oath of office" to defend the constitution of the United States and of the State of Utah.

In November, 1982, the employer received a telephone message from the Attorney General's office which advised them of the claimant's possible involvement in the practice of polygamy. Pursuant to that conversation, the

claimant was summoned before the Chief of Police to provide information on the matter. The claimant informed the Chief he was practicing polygamy. A grievance hearing was held on November 30, 1982, to decide the claimant's employment status. A Notice of Termination was issued on December 1, 1982, listing as reasons for separation that the claimant was in violation of Article III, Section I of the Utah Constitution and 76-6-101 of the Utah Code Annotated ,1953, as amended.

The claimant had a public hearing with the Murray City Civil Service Commission on February 11, 1983, and his termination was upheld by that body. He was offered reinstatement upon the condition that he cease violation of Article III, Section I of the Utah Constitution and 76-6-101 of the Utah Code Annotated, and not engage in the practice of polygamy until the law was determined to be unconstitutional or legislation was enacted to change the law. The claimant refused to comply with the order of the Murray City Civil Service Commission. The County Attorney has refused to prosecute the claimant. There are persons throughout the State of Utah who openly and defiantly practice polygamy. There have been few, if any, prosecutions or arrests for bigamy for a number of years.

The claimant has initiated legal proceedings to challenge the constitutionality of Utah's Anti-polygamy law through the courts.

The claimant was denied unemployment insurance benefits effective January 2, 1983, under provisions of Sec-

tion 35-4-5(g) of the Utah Employment Security Act. He did not appeal that decision and has received no benefits since the date of that disqualification.

REASONING AND CONCLUSION OF LAW:
The Utah Employment Security Act requires a denial of benefits be imposed if it is shown that the claimant was discharged by the employer for an act or acts connected with his or her employment that showed willful, wanton disregard of an employer's interest, deliberate violations of standards of behavior the employer has a right to expect and/or carelessness or neglect of such a degree or recurrence to show blameful intent. Ineligibility depends upon the existence of three factors:

(1) The employee must commit an act which is deliberate, willful or wanton;

(2) The act must be connected with employment; and

(3) The act must be adverse to the employer's rightful interests.

For conduct to be disqualifying under the Act it must be connected with the work. Section 85 of the *General Rules of Adjudication, Industrial Commission of Utah, Department of Employment Security,* Misconduct-Connection with Work, provides in part:

> Offenses outside the scope of the claimant's employment are not disqualifying unless they bear such a relationship to his particular kind of job as to render him unsuitable for his employment.

> Civil offense or moral wrongs must be clearly shown as connected with work by some adverse effect upon the employer's interests before a disqualification may be correctly applied under the unemployment compensation law.

Under this rule the conduct of the claimant is not disqualifying if it did not render him unsuitable to perform the tasks of a police officer. The employer contends the claimant's conduct would result in the loss of public respect for the officer and Department as a whole, and a deterioration of relationships between the claimant and fellow officers. This assertion is without support in the record. The claimant was considered an outstanding officer. The County Attorney's refusal to prosecute the claimant, and the general acceptance that similar cases have not been pursued by law enforcement bodies or the courts has the effect of diminishing the offense in the public mind. Nothing in the record indicates that the claimant has lost his usefulness, effectiveness, or credibility in the community, with the City, or his fellow officers. The Murray City Civil Service's findings and offer to reinstate the claimant hardly describes one who has been rendered "unsuitable for his employment."

In *Continental Oil, Supra,* the Utah State Supreme Court *ployment Insurance Appeals Board,* 25 Cal. App. 1035, relied upon the reasoning of *Jacobs v. California Unem-* 102 Cal. Reptr. 364, in stating that the test of misconduct is essentially volitional. (The 1979 amendment to the Employment Security Act replaced "misconduct" with an "Act . . . in connection with employment . . . which is deliberate, willful or wanton, etc.)

> . . . The conduct may be harmful to the employer's interest and justify the employee's discharge; nevertheless, it evokes the disqualification for unemployment benefits *only* if it is willful, wanton or equally culpable. *Continental,* At 731.

The Police Department's right to discharge the claimant for the conduct in question is not the issue in this case. The issue in willful misconduct cases under the Employment Security Act is whether the state is justified, under the circumstances, in denying benefits for such conduct. The state is so justified only if it finds the deliberateness, willfulness, wantoness, or equal culpability required by law. The claimant's practice of polygamy was outside the scope of his employment and was motivated by a strong religious conviction. The evidence is clearly insufficient to establish that the claimant intended to cause harm to his employer or that his act was intentional disregard of the employer's rightful interests.

Although the claimant's conduct may have justified his discharge, it is only disqualifying if it satisfies the three requirements set forth in Section 35-4-5(b)(1) of the Utah employment Security Act. Based on the evidence in the record, the Appeals Referee is unable to make such a finding and it is, therefore, ruled the Department correctly allowed benefits to the claimant.

DECISION:

The decision of the Department Representative allowing benefits effective Decembr 5, 1982, is herewith affirmed. Unemployment insurance benefits will be paid to the

claimant provided he meets the other requirements for eligibility.

Norman Barnes
Appeals Referee
Department Of Employment Security

This decision will become final unless within ten days from *March 8, 1983,* further *written* appeal is made to the Board of Review (P.O. Box 11600, Salt Lake City, Utah 84147) setting forth the grounds upon which the appeal is made.

jsn
Attachment

cc: Murray City Corporation
5025 South State
P.O. Box 7520
Murray, Utah 84107

Dennis V. Haslam, Attorney at Law
Parsons & Crowther
455 South Third East
Salt Lake City, Utah 84111

EXCERPTS FROM THE UTAH EMPLOYMENT SECURITY ACT

SECTION

35-4-4 An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the commission that:

(a) He has made a claim for benefits with respect to such week in accordance with such regulations as the commission may prescribe.

(b) He has registered for work at and thereafter continued to report to an employment office in accordance with any regulations the commission may prescribe.

(c) He is able to work and is available for work during each and every week with respect to which he made a claim for benefits under this act, and acted in good faith in an active effort to sceure employment . . .

(e) He has furnished the commission separation and other reports containing any information the commission may be regulation prescribe.

35-4-5 An individual shall be ineligible for benefits or for purposes of establishing a waiting period.

(a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for such services equal to at least six times the claimant's weekly benefit amount; provided,

that no claimant shall be ineligible for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification. A claimant who has left work voluntarily to accompany, follow or join his/her spouse to or in a new locality does so without good cause.

(b)(1) For the week in which the claimant was discharged for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

(b)(2) For the week in which the claimant was discharged for dishonesty constituting a crime in connection with his work as shown by the facts together with his admission, or as shown by his conviction in a court of competent jurisdiction of a crime in connection with that dishonesty and for the 51 next following weeks, provided that when by reason of his alleged dishonesty in connection with his work, the individual is held in legal custody or is free on bail, any determination of his eligibility shall be held in abeyance pending his release or conviction.

(c) If the commission finds that the claimant has failed without good cause to properly apply for available suitable work, to accept a referral to suitable work offered by the employment office, or to accept suitable work off-

ered by an employer or the employment office. Such ineligibility shall continue until the claimant has performed services in bona fide covered employment and earned wages for the services in an amount equal to at least six times the claimant's weekly benefit amount; provided no claimant shall be ineligible for benefits for failure to apply, accept referral, or accept available suitable work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

(d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class, or group of workers at the factory or establishment at which he is or was last employed.

(e) For each week with respect to which the claimant willfully made a false statement or representation or knowingly failed to report a material fact to obtain any benefit under provisions of this act, and an additional 13 weeks for the first week the statement or representation was made or fact withheld and six weeks for each week thereafter, such additional weeks not to exceed 49 weeks. The additional period shall commence on the Sunday following the issuance of a determination finding the claimant in violation of this subsection. In addition, each individual found in violation of this subsection shall pay to the commission twice the amount received by reason of the false representation or statement or failure to report a material fact. This amount shall be collectible by civil action or warrant in the manner provided in section

34-4-17(c) and (e). A claimant shall be ineligible for future benefits or waiting week credit if any amount owed under this subsection remains unpaid. . . .

(g) For any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of such school attendance; unless the major portion of his wages for insured work during his base period was for services performed while attending school, provided, however, that notwithstanding the foregoing provisions of this subsection an otherwise eligible individual shall not be ineligible to receive benefits while attending a part-time training course. An otherwise eligible individual shall not be ineligible to receive benefits by reason of non-availability for work, failure to search for work, refusal of suitable work, or failure to apply for or to accept suitable work with respect to any week he is in training with the approval of the commission.

(h) For any week with respect to which he is receiving, has received, or is entitled to receive remuneration in the form of: (1) Wages in lieu of notice, or a dismissal or separation payment; or (2) Accrued vacation or terminal leave payment. Provided that if the remuneration is less than the benefits which would otherwise be due, he is entitled to receive for that week a reduced benefit as prescribed.

(i) For any week in which the individual's benefits are based on service for an educational institution . . . and which begins during the period between two succes-

sive academic years during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract if the individual performs services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for an educational institution in the second of such academic years or terms . . . compensation payable on the basis of such services shall be denied . . . for any week which commences during an established or customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, an dthere is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess.

35-4-6(c) The claimant or any other party entitled to notice of a determination as herein provided may file an appeal from such determination with an appeal referee within ten days after the date of mailing of the notice to his last-known address. . . . .

35-3-6(d) . . . If any person, by reason of his own fault, has received any sum as benefits under this act to which under a redetermination or decision pursuant to this section, he has been found not entitled, he shall be liable to repay such sum, and/or shall, in the discretion of the commission, be liable to have such sum deducted from any future benefits payable to him. . . .

35-4-6(e) If any person has received any sum as benefits

under this act to which under a redetermination or decision he was not entitled, and it has been found that he was without fault in the matter, he is not liable to repay such sum but shall be liable to have such sum deducted from any future benefits payable to him with respect to the benefit year current at the time of such receipt.

35-4-22(m) "Unemployment." (1) An individual shall be deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. . . .

EXCERPTS FROM THE DEPARTMENT OF EMPLOYMENT SECURITY RULES AND REGULATIONS

SECTION

3.e.(1) An individual shall be ineligible for payment of extended benefits for any week of unemployment if:

(a) He failed to accept any offer of suitable work (as defined under paragraph (3)) or failed to apply for any suitable work to which he was referred by the commission;

(b) He failed to actively engage in seeking work by (5)(a) engaging in a systematic and sustained effort to obtain work, and (b) furnishing tangible evidence that he was engaged in such effort during such week.

(2) Any individual who has been found ineligible for extended benefits shall also be denied benefits beginning

with the first day of the week following the week in which such failure occurred and until he has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than 6 times the extended weekly benefit amount.

(3) Any work which is within such individual's capabilities, provided that the gross average weekly remuneration payable for the work must exceed the sum of:

(a)(b) The individual's extended weekly benefit amount plus the amount, if any, of supplement unemployment benefits:

(c) Pays wages not less than the higher of (1) The Federal minimum wage, or (2) The applicable state or local minimum wage.

(d) No individual shall be denied extended benefits for failure to accept an offer of or apply for any job if: (1) The position was not offered in writing and was not listed with the Job Service; (2) Such failure could not result in a denial of benefits under the definition of suitable work for regular benefit claimants . . .; (3) The individual furnishes satisfactory evidence that his or her prospects of obtaining work in his or her customary occupation within a reasonably short preiod are good. If such evidence is satisfactory the determination of whether any work is suitable shall be made in accordance with the definition of suitable work for regular benefit claimants.

(7) An individual who has been denied benefits under the provisions of section 35-4-5(b)(2) shall not be eligible to receive extended benefits until after the end of the 52-week denial period and has, subsequent to the date of such disqualification, performed services in bona fide covered employment and earned wages for such services equal to at least six times the individual's weekly benefit amount.

APPENDIX D

BEFORE THE MURRAY CITY CIVIL SERVICE COMMISSION

IN THE MATTER OF THE APPEAL OF ROYSTON E. POTTER

FINDINGS AND DECISION

Pursuant to Sections 12 and 13 of the Murray City Civil Service Commission Rules and Regulations, and notice having heretofore been given, the matter came for public hearing before the Civil Service Commission on this 11th day of February, 1983, at the hour of 12:00 Noon. Present were Commissioner Ben Madsen, Commissioner Valdon Hunt, Commissioner Robert Killpack, Mr. Craig Hall, Attorney for Murray City; Dennis Haslam and Don Winder, Attorneys for the Appellant; and Mr. R. E. Potter, Appellant.

The Commission having heard sworn testimony; having reviewed the record before it; having reviewed all evidence presented; and being fully advised, does hereby enter the following:

FINDINGS

1. That Royston E. Potter was hired as a Murray City Police Officer on or about September 15, 1980.

2. That he was terminated on or about the 30th day of November, 1982, for "cause" as set forth in the Notice of Termination dated the 1st day of December, 1982, and the Complaint dated the 10th day of December, 1982, both of which are a part of the record herein and incorporated by reference.

3. That a hearing was held on the 30th day of November, 1982, before the Chief of Police. Attending that hearing were the Murray City Attorney, Lt. Paul Forbes and a Court Reporter.

4. That approximately ½ to one hour before the hearing, Appellant's attorney requested a postponement since he could not attend.

5. The postponement request was denied and the hearing was held, without the presence of Appellant's attorney.

6. That at the hearing, Mr. Royston E. Potter admitted engaging in polygamy having two wives and children by both. He admitted having two wives at the time of his hiring and of failure to disclose it. A complete copy of the transcript (City Exhibit 2) is made a part of these Findings and is a part of the record.

7. That at the time he was hired, Appellant took an Oath to defend the Constitution of the United States and of the State of Utah.

8. That at the Grievance Hearing on November 30, 1982, Appellant conceded that he could not, or would not, support Article III, Section I of the Utah Constitution, in that he would not make an arrest for Bigamy under 76-6-101 of the Utah Code Annotated, 1953, as amended. Appellant based his refusal upon his First Amendment right to practice his religion as he sees fit, so long as it does not interfere with another's rights. His beliefs appear to be sincere.

9. That his taking of the "Oath of Office" constituted misrepresentation on his part.

10. That Appellant Potter testified at this hearing, that he would arrest for Bigamy if ordered to do so, admitting that he had changed his mind in the time between the Grievance Hearing and the Civil Service Hearing.

11. That Appellant's performance as a Police Officer was exemplary; his competence unquestioned; and that to date, his practice of polygamy has not affected his performance as a Police Officer.

12. That Chief Gillen testified that he know of no prosecutions or arrests for Bigamy in his 32 years as a Police Officer.

13. That while not specifically presented as evidence, the Commission is aware that the County Attorney has refused to prosecute; the Commission is also aware that there are many persons throughout the State who openly and defiantly practice polygamy.

14. That Appellant's practice of polygamy constitutes the Commission of a continuing felony of the third degree and thus violates his "Oath of Office" and constitutes "misconduct" in violation of Section 11-3(k) of the Murray City Civil Service Commission — Rules and Regulations.

15. That to date there has been no unequal application of discipline by the department, in that no case

nor evidence of any kind has been submitted to the department or to this Commission to the effect that other employees have or are engaged in acts of fornication or adultery.

16. That fornication and adultery, while constituting violations of the Utah Criminal Code, they are, nevertheless, misdemeanors while polygamy (Bigamy) is a felony.

17. That Appellant testified that in his view, one's religious principles override a law (or laws) which in Appellant's opinion, is unconstitutional, and further, that his violation of such law or laws should not subject him to penalty.

18. That no law, either in the form of legislation or case, was submitted which contravened the constitutionality of Article III, Section I, of the Utah Constitution, or of 76-6-101, Utah Code Annotated, and indeed this Commission must conclude, based upon present law, that the same are in fact constitutional and that this Commission should not attempt to determine questions of constitutionality.

19. That to order reinstatement of Appellant under present circumstances would, in the opinion of this Commission, result in the loss of public respect for Officer Potter and the department as a whole, without which a Police Department cannot effectively operate.

20. That to order reinstatement of Appellant under present circumstances, in the opinion of this Com-

mission, would result in a deterioration of the quality of relationships between Appellant and his fellow officers.

21. That to order reinstatement of Appellant under present circumstances would be to sanction and allow Appellant to place his own values and ideas above the law in the name of religious freedom. A Peace Officer, more than anyone else, must understand that there are ways, other than violating a law, to bring about a change. An Officer cannot be allowed to pick and choose between those laws which he will follow, and those he will not, any more than he can choose which laws he will or will not enforce.

It is for these reasons and Findings heretofore made, that the following ORDER is entered pursuant to Sections 12 and 13 of the Murray City Civil Service Commission — Rules and Regulations.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That Royston E. Potter, Appellant herein, be reinstated upon the condition that within five days from the date of this ORDER, he provide the Chief of Police, a duly sworn affidavit stating in clear and precise terms that he will, as of that date, cease his violation of Article III, Section I, of the Utah Constitution and of 76-6-101 of the Utah Code Annotated; that he will from thereafter not engage in the practice of polygamy until such time as a Court of competent jurisdiction determines the law to be unconstitutional or legislation is enacted to change the same.

It is further ordered that if Appellant complies with this condition, that all salary and benefits payable from the date of his termination to the date of reinstatement be and the same are hereby forfeited, and his suspension for that period of time is affirmed.

It is further ordered that should Appellant not comply with the condition heretofore imposed, that the decision of the Department to terminate Appellant's employment be affirmed.

ENTERED this 18th day of February, 1983.

BY THE CIVIL SERVICE COMMISSION

Ben Madsen

Valdon Hunt

Robert H. M. Killpack

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings and Decision and Order were served upon Dennis V. Haslam and Don Winder, of Parsons & Crowther, Attorneys for Royston E. Potter, 455 South Third East, Salt Lake City, Utah, by leaving a copy with Dennis V. Haslam, and upon Murray City Corporation, 5025 South State Street, Murray, Utah, by leaving a copy with H. Craig Hall, City Attorney, this 18th day of February, 1983, at 12:38 p.m.

Dale T. Whittle

CERTIFICATION

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Stanley H. Griffin, upon oath certify that I am employed by the Department of Employment Security, State of Utah as Appeals Referee, and that attached hereto a genuine copy of the Decision of Appeals Referee, Appeals Section, Industrial Commission of Utah, Department of Employment Security, In the Matter of Royston E. Potter, Case No. 82-A-6361, effective March 8, 1983.

Stanley H. Griffin

SUBSCRIBED and SWORN to before me this 9th January, 1984.

Sheila C. Mast,
NOTARY PUBLIC

Residing at Salt Lake County, Utah

My Commission Expires:
May 29, 1984

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-197

No. 85-179

In the Supreme Court of the United States

October Term 1985

ROYSTON E. POTTER,

Petitioner,

vs.

MURRAY CITY, a municipal corporation, CALVIN G. GILLEN, individually and in his capacity as Chief of Police of Murray City, MURRAY CITY CIVIL SERVICE COMMISSION, THE HONORABLE SCOTT M. MATHESON, as Governor of the State of Utah, THE HONORABLE DAVID L. WILKINSON, as Attorney General of the State of Utah, STATE OF UTAH and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN RESPONSE TO PETITION OF WRIT OF CERTIORARI FOR THE STATE OF UTAH RESPONDENTS

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN RESPONSE TO PETITION OF WRIT OF CERTIORARI FOR THE STATE OF UTAH RESPONDENTS

STATEMENT OF THE CASE

Petitioner was hired as a police officer by the Murray City Police Department in September of 1980. On

December 1, 1982, Petitioner was terminated by Murray City's Chief of Police, Calvin L. Gillen, for failure to uphold his oath of office, namely, to uphold the Constitution and laws of Utah. (R. Vol. III, 576). Utah Const. Art. III, § 1 prohibits the practice of polygamy and Utah Code Ann. § 76-6-101(1) (1953) makes the practice of polygamy a criminal offense.

Subsequent to his termination and as a result thereof Petitioner sought review of Chief Gillen's decision before the Murray City Civil Service Commission "(the Commission") and filed an application for unemployment benefits from the Industrial Commission of Utah, Department of Employment Security ("Industrial Commission"). The Commission ordered Petitioner's reinstatement subject to renouncing polygamy which Petitioner refused to do. (R. Vol. III, 577). The Industrial Commission denied Petitioner's unemployment benefits.

Consequently, Petitioner brought suit against Respondents in the District Court for the State of Utah for declaratory relief and for damages pursuant to 28 U.S.C. § 1983. The United States was joined as a party upon the motion of the State of Utah. The parties filed cross motions for summary judgment. The District Court denied Petitioner's motion for summary judgment and generally granted Respondents' motions for summary judgment. The United State's motion for summary judgment based upon improper joinder, however, was denied. On appeal, the Tenth Circuit Court of Appeals affirmed and modified the District Court's decision. The Tenth Circuit held that the United States was not a proper party but otherwise affirmed the District Court.

SUMMARY OF ARGUMENT

Certiorari review of this case is not warranted. No court of appeals "has rendered a decision in conflict with the decision of" the Tenth Circuit on the practice of polygamy, nor has the Tenth Circuit or the District Court of Utah "so far departed from the accepted and usual course of judicial proceedings" in this case, "as to call for the exercise of this Court's power of supervision." S.Ct. Rule 17.

Furthermore, this Court has never recognized, and in fact has denied, a constitutionally protected right to practice polygamy based upon the free exercise of religion and has not extended the scope of the fundamental rights strand of the Equal Protection Clause to include the practice of polygamy.

ARGUMENT

There is no need to grant the Writ in the present case. This Court has never held that there is a fundamental right to be married to more than one person at the same time. Without such a fundamental right at stake, the State need only show a rational basis for its regulatory scheme. This is amply reflected in the opinions of the Courts below which discuss the myriad of legal incidents which attach to the civil contract of marriage.

Even if a compelling interest standard should be applied to this issue, it cannot be gainsaid that the elected representatives of the people, in Congress and in all of the 50 states (not to speak of every Western nation), have contemplated "interests of the highest order" when

they have unanimously chosen to base the legal structure of their societies upon a foundation of monogamous marriage. Furthermore, the nature of the civil contract of marriage, with its attendant burdens and benefits, is such that the legislatures are in the best position to define its scope and limitations including specifically the matter of how many spouses a person may have at one time, regardless of any purported religious preferences.

It bears remembering that the Petitioner here has not been molested in any way relative to an arguable right of "privacy," to live with whomever he may choose —that issue may eventually come in another case and on another day. Rather he seeks by this action to invoke the full panoply of legal incidents of the civil contract of marriage for his plurality of wives.[1] This is not "privacy law." The Courts have clearly and repeatedly spoken on this subject and have never departed from the result announced in *Reynolds v. United States,* 98 U.S. (8 Otto) 145 (1878), where this Court clearly determined that the practice of polygamy, even for genuinely held religious reasons, is not protected under the Free Exercise clause of the First Amendment. While the polygamy issue may have been an important national issue at one time, and especially so in Utah, it is hardly worthy of

[1] It is of course specious for Petitioner to say as he does (Petition p.13) that "Utah's laws have accommodated the practice of plural marriage in Utah for over 135 years." If that were literally true, there would be no case at bar for Petitioner would not need to have his marital practices sanctioned by a federal court as a constitutional right in order to achieve the status he seeks. Rather, Utah's laws, like those of all the states, prohibit polygamy and do not extend the legal incidents of marriage to plural wives. Changing this status quo is Petitioner's goal which he now seeks to further by his Petition for Certiorari.

notice today when no legislative body in this country has even contemplated legitimizing the practice.

The Court below has correctly applied the law and the precedents of over 100 years' standing and there is no need for this Court now to re-examine this long-settled issue.

CONCLUSION

Petitioner throughout the course of the present case urges constitutional recognition of an alleged right to practice polygamy. This so-called constitutional right, it is alleged, is protected by the "fundamental rights" strand of the Equal Protection clause of the Fourteenth Amendment and the Free Exercise clause of the First Amendment.

To assert this ostensible right, Petitioner has attempted to create a confusing, conflicting mystique surrounding the penumbral emanations of *Griswold v. Connecticut*, 310 U.S. 479 (1965) and has endeavored to discredit *Reynolds*.

Petitioner's mystique is easily dispersed by a careful reading of the cited cases. Likewise, *Reynolds*, although continually attacked by Petitioner as well as certain scholars, is based upon sound reason; it recognizes the traditional legal underpinnings of our society and its basis upon monogamous marriage. Both the District Court and the Tenth Circuit took comfort in these fundamental historical precedents. For these reasons, a writ of

certiorari should not issue to review the decision of the Tenth Circuit.

Respectfully submitted,

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Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1985, forty copies of the Brief In Response To Petition Of Writ Of Certiorari For The State Of Utah Respondents were mailed, postage prepaid to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543 and three copies were mailed, postage to the following:

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I further certify that all parties required to be served have been served.

/s/
PAUL M. TINKER

/s/
NOTARY PUBLIC, Residing In
Salt Lake County, State of Utah

Subscribed and sworn to before me this 28th day of August, 1985.

My Commission Expires: May 24, 1986